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MILITARY LAW REVIEW

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GRANTS OF IMMUNITY AND MILITARY LAW, 1971-1976*

Major Herbert Green**

I. INTRODUCTION

Five years ago, federal immunity law was in a state of transition and uncertainty. A newly enacted general immunity statute[1] had repealed all existing federal immunity statutes and adopted use immunity as the degree of protection necessary to supplant the privilege against self-incrimination.[2] Because the Supreme Court had never ruled on the constitutionality of use immunity and had, in dictum, cast doubt upon its validity,[3] great constitutional questions attended the enactment of the statute.

The status of military immunity law was quite different. With the exception of the possibility that the new federal immunity statute

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*This article is in the nature of a sequel to Green, *Grants of Immunity and Military Law*, 53 MIL. L. REV. 1 (1971). The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] The Organized Crime Control Act of 1970, Act of Oct. 15, 1970, Pub. L. No. 91-452, *codified at* 18 U.S.C. §§ 6001-6005 (1970).

[2] "No person . . . shall be compelled in any criminal case to be a witness against himself,...." U.S. CONST. amend. V.

[3] In Counselman v. Hitchcock, 142 U.S. 547 (1892) the Court said:

> We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . In view of the Constitutional provision, a statutory enactment to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

142 U.S. at 585-86.

would be applied to the military* it appeared that all major issues involving military immunity law had been resolved.5

The last five years have witnessed great changes in immunity law. The federal courts have resolved many of the important issues raised by the 1970 federal immunity statute, settling many of the important questions raised by the statute's enactment. Military immunity law has, however, taken a different course in the last five years. The years since 1971 have seen a veritable explosion of military immunity cases. In contrast to the mere handful of immunity cases that were decided during the first twenty years under the *Uniform Code of Military Justice,*[6] more than fifty immunity cases have been decided during the last five years. Certainly quantity alone is not a true measure of the value of these cases; however, their substance is significant and should be examined.

The purpose of this article is to examine the changes in immunity law that have occurred since 1971. The first part of the article examines the constitutionality of use immunity, the question of what is derivative use, and the procedural and evidentiary issues related to use immunity. The next portion discusses the perjury and false statement exception to grants of immunity and the foreign jurisdiction problem. The final portion examines the disqualification of the convening authority and the staff judge advocate from the review process because of their participation in the granting of immunity.

II. USE OF IMMUNITY

A. CONSTITUTIONALITY

There are two types of grants of immunity. Transactional immunity protects the witness from prosecution for any offense to which his testimony relates. The other form of immunity, called use immunity, is composed of two elements. First, the statement of a

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[4] See Green, Grants *of* Immunity and Military Law, 53 MIL. L. REV. 1, 27-34 (1971). Only one case has considered the application of the statute to the military and while implying that it could be used by the military, held that the convening authority did not comply with the provisions of the statute. United States v. Rivera, 49 C.M.R. 259 (ACMR 1974), *rev'd* on other grounds, 23 U.S.C.M.A. 430, 50 C.M.R. 389 (1975). The Department of Justice has determined that the statute is applicable to trials by courts-martial and has developed a procedure to be followed in cases where federal law enforcement interest exists. See Army Reg. No. 27-10, chapt. 7 (4 Nov. 1975) [hereinafter cited as AR 27-10]; THE ARMY LAWYER, Dec. 1973, at 22. Grants of immunity given pursuant to the statute were employed in United States v. Calley, 46 C.M.R. 1131 (ACMR), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); *see* Cooper, My *Lai* and Military Justice - *To* What Effect?, 59 MIL L. REV 93, 121-24 (1973).

[5] See United States v. Kirsch, 15 U.S.C.M.A. 84, 35 C.M.K. 56 (1964).

[6] UNIFORM CODE OF MILITARY JUSTICE arts. 1-140, 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as UCMJ].

witness compelled to testify cannot be introduced as evidence against him in a criminal trial.' Second, any information gained or derived from the compelled statement may not be used against the witness in any way.[8] A grant of immunity is legally effective when it provides the witness the same degree of protection in a criminal proceeding as that afforded by the privilege against self-incrimination.[9] When such protection is provided, the grant of immunity is said to be co-extensive with the constitutional protection and the privilege against self-incrimination may not be invoked.[10]

The constitutional history of grants of immunity has four major landmarks.'[11] In *Counselman v. Hitchcock*,[12] the Supreme Court was asked to determine whether an immunity statute[13] which only incorporated the first element of use immunity was constitutional. The Court found that the statute as applied to the witness "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him . . . in a criminal proceeding."[14] Accordingly, it held the statute to be unconstitutional. The Court went on to say, in dictum,

> . . . that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment, to be valid must afford absolute immunity against future prosecution for the offense to which the question relates.[15]

Congress rapidly responded[16] to the holding and the dictum in

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[7] Testimony given by a party in a civil case under a grant of immunity may be used against that party in a civil case, although it cannot be used in a criminal proceeding against him. United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974).

[8] Some authorities refer to use immunity as that which encompasses only the first element and employ the words *use and derivative use* to refer to both elements. Others employ the words *use immunity* to refer to immunity encompassing both elements. Still others use the words testimonial immunity when referring to both elements. Throughout this article the words *use immunity* refer to that immunity which comprises both elements.

[9] Counselman v. Hitchcock, 142 U.S. 547 (1892).

[10] Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

[11] **See** Application of the United States Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973).

[12] 142 U.S. 547 (1892).

[13] Section 860 of the Revised Statutes. This section was a reenactment of the Act of Feb. 25, 1868, ch. 13, 15 Stat. 37. Section 860 read "No pleading of a party nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture . . . .

[14] Counselman v. Hitchcock, 142 U.S. 547, 564 (1892).

[15] *Id.* at 585-86.

[16] *See* Kastigar v. United States, 406 U.S. 441, 451 (1972).

Counselman and enacted the Compulsory Testimony Act of 1893.[17] This statute provided transactional immunity for witnesses compelled to testify. In *Brown v. Walker*[18] the Supreme Court upheld the constitutionality of this statute and thereby declared that properly drawn immunity statutes provide the same degree of protection as that afforded by the privilege against self-incrimination.19

The third landmark is *Murphy v. Waterfront Commission20* where the issue was "whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction."[21] The Supreme Court held that when one sovereign in the federal system compels testimony under a grant of immunity, another sovereign is forbidden to use that testimony or its fruits against the witness in a criminal prosecution.

By 1971 the law was at least this clear: transactional immunity was constitutional; use immunity without a prohibition on derivative use was unconstitutional; and a witness given transactional immunity could not legally refuse to testify because of possible prosecution by another sovereign in the federal system.

All federal immunity statutes enacted after 1893 provided for transactional immunity.22 Therefore, no federal court found it necessary to consider the constitutionality of use immunity until 1970 when all existing federal immunity statutes were repealed.23 In their place was substituted one statute which applies to all federal courts, grand juries and agencies[24] as well as the Congress.[25] The statute provides that a witness ordered to testify may not invoke the privilege against self-incrimination,

> . . . but no testimony or other information compelled under the order (or

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[17] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.
[18] 161 U S . 591 (1896).
[19] The Court rejected the contention that the privilege against self-incrimination permitted a witness to always remain silent. *But see* United States v. James, 60 F. 257 (N.D.Ill. 1894) which held that the privilege permitted silence.
[20] 378 U.S. 52 (1964).
[21] *Id.* at *53.*
[22] A complete list of federal immunity statutes in effect in 1970 may be found in *Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S.2022, S. 2122, and S. 2292, Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 319 (1969); *see* Kastigar v. United States, 406 U.S. 441, 452 (1972).
[23] 18 U.S.C. § 6002 (1970).
[24] 18 U.S.C. §§ 6001-6005 (1970).
[25] *See* Application of United States Senate Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1273 (D.D.C. 1973).

> any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . .[26]

The constitutionality of this statute and therefore the constitutionality of use immunity was considered by the Supreme Court in Kastigar *v.* United *States.*[27]

Kastigar was given a grant of use immunity and ordered to testify before a federal grand jury. He asserted his privilege against self-incrimination, refused to testify after being ordered to do so and was subsequently held in contempt. The circuit court affirmed[28] and the Supreme Court granted certiorari[29]

> . . . to resolve the important question whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom . . . or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates . . . .[30]

The Court examined transactional immunity and likened it to an amnesty grant.[31] It considered this protection to be significantly broader than that afforded by the fifth amendment[32] and therefore not required by the Constitution. The sole concern of the fifth amendment privilege is to protect the witness from being compelled to give testimony which leads to the infliction of criminal penalties against him:[33]

> Immunity from the use of compelled testimony as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.[34]

Accordingly, the Court held that use immunity "is co-extensive with the scope of the privilege against self-incrimination and is sufficient to compel testimony over a claim of the privilege."[35]

B. WHAT CONSTITUTES DERIVATIVE USE?

Neither ***Murphy*** nor Kastigar defines derivative use. In Kastigar the appellant argued that the immunity statute did not adequately

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[26] **18** U.S.C. § **6002 (1970).**
[27] **406 U.S. 441 (1972).**
[28] Stewart v. United States, **440** F.2d **954** (9th Cir. **1971).**
[29] **402 U.S. 971 (1971).**
[30] Kastigar v. United States, **406** U.S. **441, 443 (1972).**
[31] *Id.* at **462.**
[32] *Id.* at **453.**
[33] *Id.*
[34] *Id.* at **453** (emphasis added by the Court).
[35] *Id.* at **453;** ***see*** Sarno v. Illinois Crime Investigating Comm'n, **406** U.S. **482, 483 (1972).**

insure that law enforcement officials would not use his testimony to seek out other evidence which might be used in a prosecution against him. The Court rejected this argument and stated that it considered the statute's[36] proscription against derivative use to be sweeping. It construed the proscription as

> barring the use of compelled testimony as an "investigatory lead" and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.[37]

Although the Supreme Court was commenting on the statutory provision in *Kastigar,* it appears that the definition of derivative use compelled by the Constitution is no less encompassing. In *United States u. McDaniel,*[38] the defendant testified before a state grand jury under a grant of transactional immunity. His testimony was read by the United States Attorney prior to the filing of indictments by a federal grand jury. The court held that the mere reading of the testimony rendered the Government unable to prove that it did not use the testimony. "Use," it declared, "could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination and otherwise planning trial strategy."[39] Accordingly, the conviction was reversed and the charges dismissed.

A similar reading of testimony by a prosecutor occurred in *United States u. Dornau.*[40] There the defendant testified in a Florida bankruptcy proceeding pursuant to what was thought to be a grant of use immunity. The transcript was read by the United States Attorney in New York who was involved in presenting evidence concerning the defendant to a New York grand jury which subsequently indicted the defendant. The court found that there appeared no reason for the prosecutor to have read the transcript except "to make sure his case was complete, to use the testimony to buttress what he already knew or to fill in gaps with new information"[41] and dismissed the indictment.[42]

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[36] 18 U.S.C. § 6002 (1970); *see* section II.A. *supra.*
[37] Kastigar v. United States, 406 U.S. 441, 460 (1972).
[38] 482 F.2d 305 (8th Cir. 1973). Prior decisions in this case are found at 449 F.2d 832 (8th Cir. 1971), *cert. denied,* 405 U.S. 922 (1972); 352 F. Supp. 585 (D.N.D. 1972). *See also* United States v. First Western Bank, 491 F.2d 780 (8th Cir. 1974).
[39] United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).
[40] 359 F. Supp. 684 (S.D.N.Y. 1973).
[41] *Id.* at 687.
[42] On appeal, the court of appeals held that Dornau was granted direct use but not derivative use immunity. United States v. Dornau, 491 F.2d 473 (2d Cir. 1974). Although the decision of the lower court was reversed, its reasoning was left undisturbed.

The Court of Military Appeals has also taken a very broad view of derivative use. In *United States v. Rivera*,[43] three individuals accosted the victim. In order to learn the identity of all the participants and to learn their degree of culpability, the Government granted the accused use immunity and he testified at an Article 32[44] investigation. The court found that the compelled testimony was used against the accused in three respects. First, the reading of the transcript of the immunized testimony by the trial counsel constituted prima facie use of the testimony. Second, the testimony was used by the Government to discover "the identity and extent of each accused's participation in the incident."[45] Third, by compelling the accused to testify against an accomplice the Government was then able to induce the accomplice to testify against the accused. The court believed that the second and third grounds constituted an impermissible acquisition of proof against the accused and stated that his prior testimony "cannot be used in any way to improve or perfect a case against the accused."[46] Impermissible use is also present when an accused's immunized testimony is read by the Article 32 investigating officer, the drafter of the pretrial advice and the staff judge advocate who renders the advice.[47]

Thus it appears that, like the privilege against self-incrimination, derivative use will be given a liberal interpretation[48] in favor of the right it is intended to secure.[49] In determining whether impermissible derivative use has occurred, the most important question to resolve is whether as a result of his testimony the witness is no longer in substantially the same position as he would have been had he been able to invoke the privilege and re-

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[43] 23 U.S.C.M.A. 430, 50 C.M.R. 389 (1975).

[44] Article 32 of the *Uniform Code of Military Justice* requires that a thorough and impartial investigation as to the truth and form of the charges be made before they may be referred to a general court-martial for trial. UCMJ art. 32, 10 U.S.C. § 832 (1970).

[45] United States v. Rivera, 23 U.S.C.M.A. 430, 433, 50 C.M.R. 389, 392 (1975).

[46] *Id.* at 433, 50 C.M.R. at 392.

[47] United States v. Eastman, 51 C.M.R. 525 (ACMR 1975).

[48] It appears that the interpretation of derivative use is broader than the "fruit of the poisonous tree" doctrine applied in cases involving illegal searches and arrests. *See* Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963) where the court held that the identity of a witness discovered as the result of a violation of the McNabb-Mallory rule was not 'impermissibly obtained. *But see* Smith v. United States, 344 F.2d 545 (D.C. Cir. 1965). It appears that where the exploitation of an illegal search leads to the discovery of a witness, that witness will not be allowed to testify in a military trial. United States v. Armstrong, 22 U.S.C.M.A. 438, 47 C.M.R. 479 (1973).

[49] *See* Commonwealth v. Carrera, 424 Pa. 573, 227 A.2d 627 (1967); *accord,* Hoffman v. United States, 341 U.S. 479 (1951); Enrichiv. United States, 212 F.2d 702 (10th Cir. 1954).

main silent.[50] If such a change in position is present, it is very likely that impermissible derivative use has occurred.

C. PROCEDURE AND THE BURDEN OF PROOF

Once a defendant demonstrates that he has testified under a grant of use immunity, the prosecution has the burden of proving that its evidence is from a source independent of the compelled testimony.[51] This is an affirmative burden upon the Government. Therefore, the defendant is not dependent on the good faith or the integrity of the prosecutor[52] and the government's burden of showing an independent source for its evidence extends to more than a mere "negation of taint."[53] This means that the Government must prove the source of all the evidence it intends to introduce.

The Government can discharge its burden in several ways. One court has held that where the indictment and the immunized testimony reveal that the Government had substantial information prior to the compelled testimony and that the immunized testimony is uninformative, the government's burden can be discharged by a comparison of the testimony with the indictment.[54] Notwithstanding this procedure, it appears that under ordinary circumstances a pretrial evidentiary hearing should be held.[55] However, to avoid "a further fragmentation of the trial process"[56] the hearing may be held during or after the trial.[57] Moreover, a combination of the three may be preferred. The timing of the hearing, which may be *in camera*, is within the discretion of the trial court.[58]

Although the burden of proof to establish a legitimate and wholly independent source is upon the Government, the standard of proof is not clear. *Murphy* merely indicated which party bore the burden,[59] while *Kastigar* indicated the burden was "heavy."[60] Many cases before and after *Kastigar* have considered the standard of proof that should be used to determine whether evidence is the fruit of the poisonous tree or whether it comes from a source in-

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[50] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 101 (1964) (White, J., concurring).
[51] Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964).
[52] Kastigar v. United States, 406 U.S. 441, 460 (1972); *In re* Minkoff, 349 F. Supp. 154 (D.R.I. 1972).
[53] Kastigar v. United States, 406 U.S. 441, 460 (1972).
[54] United States v. Thanasouras, 368 F. Supp. 534 (N.D. Ill. 1973).
[55] United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).
[56] United States v. First Western Bank, 491 F.2d 780, 787 (8th Cir. 1974).
[57] United States v. De Diego, 511 F.2d 818, 824 (D.C. Cir. 1975).
[58] Id. at 823. See United States v. First Western Bank, 491 F.2d 780, 785 (8th Cir. 1974).
[59] Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).
[60] Kastigar v. United States, 406 U.S. 441, 461 (1972). Another court has called the burden "substantial." Goldberg v. United States, 472 F.2d 513, 516 (2d Cir. 1973).

dependent of the illegality.[61] Nonetheless, where violations of constitutional rights are involved, no single governing standard has emerged.[62] It has been suggested that

> a workable rule giving adequate consideration to the importance of the exclusionary policy is to require the government to prove beyond a reasonable doubt that the evidence it introduces was legally obtained.[63]

However, more recently the Supreme Court has indicated that the fruits of a search are admissible if consent is proven by a preponderance of the evidence.[64] Similarly, the Court has held that a confession is admissible if voluntariness is proven by a preponderance of the evidence.65 Because testimony compelled by a grant of immunity is also directly related to the privilege against self-incrimination, it is possible that the preponderance standard and not a more stringent one must be met by the Government in order to prove that impermissible use has not occurred.66

Regardless of how the government's burden is finally articulated, it appears that courts will be very hesitant to accept government evidence in cases where the defendant has previously given immunized testimony.[67] Thus whenever the transcript of the immunized testimony is read by the prosecutor, it seems likely that the Government will be unable to prove that impermissible use has not occurred.[68] However, in those rare cases where immunized grand jury testimony compelled by one sovereign is not disclosed to agents of another sovereign, it may be possible for the prosecution to sustain its burden of proof.[69] Thus where federal agents offer uncontradicted testimony that they had no access to state compelled

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[61] ***See generally*** Wong Sun v. United States, 371 U.S. 471 (1963); Silverthome Lumber Co. v. United States, 251 U.S. 385 (1920).

[62] For a partial list of these cases and the standards employed **see** United States v. Schipani, 289 F. Supp. 43, 54-55 (E.D.N.Y. 1968).

[63] United States v. Schipani, 289 F. Supp. 43, 59 (E.D.N.Y. 1968). In affirming the decision of the district court, the circuit court stated, "we approve the legal principles applied." United States v. Schipani, 414 F.2d 1262, 1266 (2d Cir. 1969).

[64] United States v. Matlock, 415 U.S. 164, 177 (1974).

[65] Lego v. Twomey, 404 U.S. 477 (1972).

[66] ***But cf.*** Chapman v. California, 386 U.S. 18 (1967), where the Court held than an error of constitutional magnitude will require reversal unless it is proven beyond reasonable doubt that the error was harmless.

[67] ***See*** United States v. Rivera, 23 U.S.C.M.A. 430, 433 n.6, 50 C.M.R. 389, 392 n.6 (1975).

[68] ***See*** United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973). To insure that use by reading the transcript of the compelled testimony does not occur, the Army Court of Military Review has suggested that when immunized testimony is given prior to referral, jurisdicition should be transfered to a different command. United States v. Eastman, 51 C.M.R. 525 (ACMR 1975).

[69] Where only one sovereign is involved, the ability to sustain the burden of proof is more doubtful. ***See*** Piccirillo v. New York, 400 U.S. 548, 568 (1971) (Brennan, J., dissenting).

testimony and where FBI reports and grand jury minutes indicate independent sources for the evidence, it has been held that the Government has met its burden of proof.[70] The timing of the immunized statement can be crucial. Thus where immunized testimony is given after an indictment is rendered[71] or the immunized testimony is unrelated to the subject of the criminal proceeding, it is possible that the Government will be able to prove a legitimate and independent source for its evidence.[72]

11. PERJURY, FALSE STATEMENTS AND FOREIGN LAW

A. PERJURY AND FALSE STATEMENTS

Inherent in the power to compel testimony must be the power to compel truthful testimony.73 Grants of immunity would be of minimal value if grantees were not criminally liable for perjured testimony.[74] It is now well settled that immunity statutes provide no shelter for those whose immunized testimony is false.[75] The Government is not prohibited from using false testimony which is given pursuant to a grant of use immunity against the witness in ***any*** criminal proceeding.

In ***United States v. Tramunti,***[76] the defendant, pursuant to a grant of immunity, falsely testified to a grand jury in 1966.[77] In 1971 he testified in his own defense at his criminal trial and was acquitted. He was subsequently indicted for perjury allegedly committed at the 1971 trial. He was convicted of perjury, and on appeal claimed error because the prosecution was allowed to use the immunized 1966 testimony to impeach his credibility during his perjury trial. His conviction was affirmed. The court examined grants of immunity and compared them to an agreement, stating that in return for a surrender of the privilege against self-incrimination

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70 United States v. First Western Bank, 491 F.2d 780 (8th Cir. 1974).
71 ***Id.***
72 United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973).
73 Glickstein v. United States, 222 U.S. 128 (1911).
74 ***See*** United States v. Bryan, 339 U.S. 323 (1950); Glickstein v. United States, 222 U.S. 128 (1911).
75 Glickstein v. United States, 222 U.S. 128 (1911); United States **v.** Tramunti, 500 F.2d 1334 (2d Cir. 1974), ***cert. denied,*** 419 U.S. 1079 (1975).
76 500 F.2d 1334 (2d Cir. 1974), ***cert. denied,*** 419 U.S. 1079 (1975).
77 Judge Bauman, in a hearing after trial found that Tramunti's 1966 grand jury testimony was false and evasive. His failure then to remember his own and John Dioguardi's occupations was established to be false by particularly compelling evidence of perjury. Because it was false, his grand jury testimony was admissible on his perjury trial not only to impeach his credibility, but also as testimony of prior similar acts. 500 F.2d at 1345-46.

the accused will not be prosecuted on the basis of any inculpatory evidence he might give. However, "the bargain struck is conditional upon the witness who is under oath telling the truth."[78] Accordingly, it found that it is truthful and not false testimony which is compelled; and that the protection of the agreement extends only to truthful testimony and no protection for false testimony had either been given or received. When false testimony is given "the agreement is breached and the testimony falls outside the constitutional privilege."[79] Because the testimony used by the prosecution was false, it was not compelled by the grant of immunity. Therefore, the Government was free to employ it as it desired.

Another case, ***United States v. Hockenberry,***[80] provides almost a mirror image of ***Tramunti.*** There the defendant, pursuant to a grant of immunity, made an allegedly false statement to a grand jury and at the same time made unrelated true statements. In a prosecution for the false statement, the Government used the true statement in an attempt to impeach the defendant. The conviction was reversed because, unlike the situation in ***Tramunti,*** a truthful statement compelled by a grant of immunity was used against the defendant. To allow such use would so narrow a grant of immunity "as to jeopardize its adequacy as a constitutional means of requiring self-incrimination."[81]

Except for situations like that in ***Tramunti,*** the perjury and false statement exceptions extend solely to prosecutions for false testimony given pursuant to a grant of immunity. A truthful statement compelled by a grant of immunity may not be used against the defendant in any criminal proceeding for false statements made prior to the compelled testimony.[82]

The perjury and false statement exceptions to the prohibition on the use of compelled, immunized testimony are well founded. Through grants of immunity the Government can elicit otherwise

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[78] 500 F.2d at 1342. Although the defendant receives a benefit from the agreement and he may actively seek a grant of immunity, the proceeding is not the classic voluntary meeting of minds. A grantee may not lawfully refuse a valid grant of immunity.

[79] 500 F.2d at 1342.

[80] 474 F.2d 247 (3d Cir. 1975).

[81] *Id.* at 250.

[82] United States v. Layva, 513 F.2d 774 (5th Cir. 1975); United States v. Taylor, 509 F.2d 1349 (5th Cir. 1975); United States v. Watkins, 505 F.2d 545 (7th Cir. 1974); Application of United States Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973). One case has held that 18 U.S.C. § 6002 (1970) permits an immunized witness to refuse to testify if such testimony would relate to prior false statements. ***In re*** Baldinger, 356 F. Supp. 153 (C.D. Cal. 1973). This case has been overruled sub silentio. United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).

unobtainable testimony from unwilling witnesses. Thus, from the government's point of view, these grants are necessary tools for the administration of justice. The immunized witness who testifies usually obtains a significant benefit through his testimony. Normally, immunized witnesses will not be prosecuted for offenses about which they testify and even a grant of use immunity usually results in de facto amnesty.[83] In return for this benefit it is not too much to require that the witness speak the truth.[84]

B. FOREIGN LAW

Recently witnesses have refused to testify on the grounds that the witness fears that the answers he gives might incriminate him under the laws of another nation.[85] This refusal has normally occurred when the witness is being questioned before a grand jury. Because testimony before a grand jury is secret and, with the exception of official use by government attorneys, may only be disclosed by court order,[86] most courts have relied on this secrecy to reject claims of privilege based on incrimination under foreign law.[87]

The Court of Military Appeals considered the applicability of the privilege against self-incrimination under foreign law in *United States v. Murphy*.[88] There the accused was charged with conspiracy to steal United States property from warehouses located in Japan in a scheme which anticipated the final disposal of the property on the Japanese black market. A Korean co-conspirator was called as a government witness but refused to testify because he was awaiting prosecution in a Japanese court. He complied with a subsequent order to testify, and on appeal the accused argued that the order violated the witness' privilege against self-incrimination.

Judge Latimer's opinion for the court rejected the accused's position that he had standing to object to the alleged infringement of the witness' rights. Moreover, he held that the privilege against self-incrimination applies only to American law and may not be invoked to protect the witness from prosecution by another nation.

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[83] See United States v. Rivera, 23 U.S.C.M.A. 430, 433 n.6, 50 C.M.R. 389, 392 n.6 (1975).

[84] *Cf.* Kastigar v. United States, 406 U.S. 441, 443 (1973).

[85] See, *e.g.*, Zicarelli v. Comm'r of Investigation, 406 U.S. 472 (1972); *In re* Weir, 495 F.2d 879 (9th Cir. 1974); *In re* Tierney, 465 F.2d 806 (5th Cir. 1972); *In re* Cahalane, 361 F. Supp. 226 (E.D.Pa. 1973). Although only one military case has considered this issue to date, with members of the armed forces stationed throughout the world it is more than conceivable that refusal to testify for this reason will be advanced in future military trials.

[86] FED. R. CRIM. P. 6.

[87] *In re* Weir, 495 F.2d 879 (9th Cir. 1974); *In re* Tierney, 465 F.2d 806 (5th Cir. 1972); *In re* Parker, 411 F.2d 1067 (10th Cir. 1969).

[88] 7 U.S.C.M.A. 32, 21 C.M.R. 158 (1956).

Additionally, he cited the practical problem of ascertaining with a degree of certainty the nature of the foreign law in issue and believed that extending the privilege against self-incrimination to foreign law might lead to spurious invocations of the privilege. Judge Quinn concurred only in the result and believed that Status of Forces Agreements might permit the invocation of the privilege. Judge Ferguson did not participate in the decision. Therefore, despite Judge Latimer's stated purpose, to settle "the question of whether this privilege extends to protect the witness who may incriminate himself in a foreign jurisdiction,"[89] it appears that *Murphy* has not resolved the issue in military law.[90]

One court has sustained the claim of privilege. In *In re Cardassi*[91] a witness before a federal grand jury in Connecticut refused to answer questions pertaining to drug trafficking because her answers might incriminate her under Mexican law. The court found that contrary to the law, it was possible that her grand jury testimony might be divulged without a court order.[92] Since no exclusionary rule supervision could be maintained by American courts over a foreign tribunal, the witness could not be protected in the event of such a leak. Moreover, the court found there was a reasonable basis for fearing Mexican prosecution.[93] Therefore, the court held that where the danger of foreign prosecution is real and not imaginary or speculative, the privilege against self-incrimination may be invoked.[94]

Whether a witness should be permitted to assert the privilege to avoid incrimination under foreign law is a difficult policy decision. To allow the invocation of the privilege might hinder law enforcement; however, as *Cardassi* indicates, many provisions of the Bill of Rights have that effect.[95] On the other hand, in our times crime is international,[96] drugs flow all too freely across international

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[89] *Id.* at 34, 21 C.M.R. at 160.
[90] *See* United States v. Carter, 16 U.S.C.M.A. 277, 36 C.M.R. 433 (1966) (Quinn, C.J., concurring).
[91] 351 F. Supp. 1080 (D. Conn. 1972).
[92] FED.R. CRIM. P. 6.
[93] Apparently it is no answer to say that Mexican prosecution could be avoided by not traveling to Mexico. See *In* re Cahalane, 361 F. Supp. 226 (E.D. Pa. 1973).
[94] The Supreme Court has recently avoided this issue by declaring that under the facts of the case, the defendant was not in real danger of disclosing information which might incriminate him under foreign law. Zicarelli v. Comm'r of Investigation, 406 U.S. 472 (1972). In Murphy v. Waterfront Comm'n, 378 U.S. 52, 67, 77 (1964), the Court examined English law and found that it supported such a claim of privilege. However, the Murphy analysis was directed toward the applicability of the privilege in the federal system and should not be considered as definitive with respect to the foreign sovereign issue. See *In re* Parker, 411 F.2d 1067, 1070 (10th Cir. 1969).
[95] *In* re Cardassi, 351 F. Supp. 1080, 1086 (D. Conn. 1972).
[96] See Zicarelli v. Comm'r of Investigation, 406 U.S. 472 (1972).

boundaries[97] and terrorism recognizes no political limits.[98] Therefore, a decision such as the one reached in ***Cardassi,*** which appears to be compelled neither by history nor logic, may have an effect of hindering law enforcement which outweighs the benefits to society that accrue from the privilege against self-incrimination. It is submitted

> that the fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation. The ideology of some nations considers failure itself to be a crime and could provide punishment for the failure, apprehension or admission of a traitorous saboteur acting for such a nation within the United States. In such a case the words "privilege against self-incrimination" engraved in our history and law as they are, may turn sour when triggered by the law of a foreign nation.[99]

IV. GRANTS OF IMMUNITY IN THE MILITARY

A. CONVENING AUTHORITY DISQUALIFICATION

Before a convening authority can approve the findings of a court-martial he must be satisfied of the guilt of the accused beyond reasonable doubt.[100] In making his judgment he is "empowered to weigh evidence, judge the credibility of witnesses and determine controverted questions of fact."[101] By 1971 it had been settled that any convening authority who had granted immunity to a witness was disqualified from taking the action in a case in which the witness testified.[102] He was disqualified because "it is asking too much of him to [impartially] determine the weight to be given this witness' testimony since he granted the witness immunity in order

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[97] ***See In re*** Weir, **495 F.2d 879** (9th Cir. **1974**);***In re*** Cardassi, **351** F. Supp. 1080 (D. Conn. **1972**).

[98] ***See In re*** Parker, **411 F.2d 1067** (10th Cir. **1969**);***In re*** Cahalane, **361** F. Supp. **226 (E.D** Pa. **1973**).

[99] ***In re*** Parker, **411 F.2d 1067, 1070** (10th Cir. 1969), ***vacated and remanded for dismissal as moot,*** **397** U.S. 96 **(1970).**

[100] UCMJ art. **64.**

[101] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. **87** [hereinafter cited as MCM, **1969**].

[102] United States v. White, 10 U.S.C.M.A. **63, 27** C.M.R. **137 (1958);** *see* United States v. Gilliland, 10 U.S.C.M.A. **343, 27** C.M.R. **417 (1959);** United States v. Moffet, 10 U.S.C.M.A. **169, 27** C.M.R. **243 (1959).** Prior to **1971** only one exception existed. Where a grant of immunity was given to secure a defense witness, the convening authority was not disqualified. United States v. Frye, **39** C.M.R. **448** (ABR), ***petition denied,*** **18** U.S.C.M.A. **615, 39** C.M.R. **293 (1968).** A grant of use immunity will disqualify the convening authority to the same extent as a grant of transactional immunity. United States v. Hillmon, ___ C.M.R. ___ (ACMR **9** Apr. **1976**);***see*** United States v. Crump, CM **432298** (ACMR **25** Feb. **1976**) (unpublished).

to obtain his testimony."[103] The disqualification rule is not limited to only those cases where grants of immunity are given. It applies where a pretrial agreement with the accused in another case provides that that accused testify as a witness in the instant case.[104] Similarly, a promise of leniency prior to trial[105] or a promise of clemency after trial made for the purpose of influencing the promisee to testify also disqualifies the convening authority.[106]

"It is in the convening authority's fact-finding role that disqualification has its genesis — the inclination to give undue weight to a witness' testimony which flows from a grant of immunity."[107] Therefore, if subsequent to a grant of immunity the accused pleads guilty and the immunity grantee does not testify, the convening authority is not disqualified.[108] Similarly, the disqualification does not extend to those offenses to which the grantee does not testify. Thus where an accused pleads guilty to some offenses and contests others and the immunity grantee testifies only with respect to the contested offenses, the convening authority is not totally disqualified from taking action. However, to allow him to take the action he must disapprove the findings of guilty with respect to the contested offenses.[109] Moreover, when the grant of immunity pertains to offenses other than those involved in the trial, the convening authority is not disqualified from taking the action.[110]

These cases indicate that the general rule of automatic disqualification if the grantee testifies is subject to some exceptions. However, the converse of the general rule — that if the grantee does

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[103] United States v. White, 10 U.S.C.M.A. 63, 27 C.M.R. 137, 138 (1958).
[104] United States v. Gilliland, 10 U.S.C.M.A. 343, 27 C.M.R. 417 (1959); United States v. Gilliam, 46 C.M.R. 974 (ACMR 1972); United States v. Ross, 44 C.M.R. 865 (ACMR 1971).
[105] *See* United States v. Peterson, 48 C.M.R. 126 (CGCMR 1973).
[106] United States v. Tillahash, 46 C.M.R. 1091 (ACMR 1973).
[107] United States v. Wilson, 43 C.M.R. 739, 740 (ACMR 1971).
[108] *Id.* *Contra,* United States v. Stuckey, CM 432641 (ACMR 18 Mar. 1976) (unpublished). In *Stuckey* a grant of immunity was given to an individual who during the early stages of the investigation was an apprehended suspect. He was not called as a witness, but the staff judge advocate considered both himself and the convening authority disqualified and asked the next superior command to review the case. The superior command declined and the subordinate staff judge advocate authored the review. The court reversed. It found no reason in the record to explain why the immunity grantee did not testify. The court speculated that the immunity was given to insure the "further silence" of the grantee and ordered a new review by another staff judge advocate.

It is submitted that the court's decision is unreasonable. It is a most extreme example of a court reaching far beyond the record to discover the appearance of evil where none reasonably exists. Therefore, it is fortunate that the opinion will remain unpublished.
[109] *See* United States v. Grella, 47 C.M.R. 947 (ACMR 1973).
[110] United States v. Duffey, 46 C.M.R. 1056 (NCMR 1973).

not testify the convening authority is not disqualified—is also subject to an exception. In United States *v. Smith*,[111] grants of immunity were given to two witnesses. The accused subsequently pleaded guilty and the witnesses did not testify. However, the Government introduced their pretrial statements in aggravation during the sentencing portion of the trial. Despite the fact that the statements were made prior to the grant of immunity, the court found that statements of "witnesses who had been granted immunity were used in a manner detrimental"[112] to the accused and that the grant reflected a prejudgment of the convening authority as to the weight of the statements. Accordingly, it held that the convening authority was disqualified from taking the action.

From the foregoing it appears that despite the early pronouncements of the Court of Military Appeals,[113] disqualification is not caused solely because the convening authority has made a prejudgment as to the credibility of the witness. Rather disqualification results if he has made a prejudgment as to a witness' credibility with respect to a *particular* subject matter. Utilizing this test of subject matter credibility, it is clear why a convening authority may not be disqualified even though the grantee testifies and why he may be disqualified although the grantee does not testify.[114]

Where no actual grant of immunity exists or where no explicit promise not to prosecute is made, it is possible that certain activities or inaction of government agents may be held to be tantamount to grants of immunity which result in the disqualification of the convening authority. In United States *v. Williams*,[115] an accomplice testified that he was told by an agent in the Office of Special Investigations that the base commander had indicated that if he cooperated he would be immune from prosecution. A post-trial affidavit from the commander indicated that he had never granted immunity and was not authorized to do so.[116] On appeal, the accused claimed the commander as convening authority was disqualified from taking the action. The court agreed and reversed. It examined the record and found that although a substantial

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[111] 23 U.S.C.M.A. 495, 50 C.M.R. 575 (1975).
[112] *Id.* at 496, 50 C.M.R. at 576.
[113] *See, e.g.*, United States v. Gilliland, 10 U.S.C.M.A. 343, 27 C.M.R. 419 (1959); United States v. White, 10 U.S.C.M.A. 63, 27 C.M.R. 137 (1958).
[114] The disqualification is personal not official. Therefore a successor in command is not disqualified from taking the action. United States v. Gilliland, 10 U.S.C.M.A. 343, 27 C.M.R. 417 (1959); United States v. Butler, 48 C.M.R. 849 (AFCMR 1974).
[115] 21 U.S.C.M.A. 292, 45 C.M.R. 66 (1972).
[116] The base commander was a special court-martial convening authority and only a general court-martial convening authority can grant immunity. MCM, 1969, para. 68h.

degree of evidence against him existed, the accomplice was not prosecuted for his involvement with the accused in the alleged robbery. Accordingly, the court held that in view of the evidence, the inaction of the Government was "tantamount to a grant of immunity."[117] In a later case an accomplice stated that he was told by trial counsel that charges against him would be dismissed if he testified as a witness. No contrary evidence appeared in the record and the witness was not prosecuted. The court held that a grant of immunity existed and that the convening authority was disqualified from taking the action.[118]

It appears that the mere failure to prosecute a witness, who is not an accomplice, on unrelated charges will not trigger a presumption that a grant of immunity exists.[119] However, where an accomplice who has not been prosecuted offers unrebutted testimony that he has been granted immunity it is likely that a court will find that a grant of immunity exists and hold that the convening authority is disqualified from taking the action.

Such a finding would be difficult to justify. The mere fact that evidence is uncontradicted means very little. Many times experienced prosecutors do not challenge statements of witnesses because in their judgment the statement is not crucial to the outcome of the case. Moreover, challenging such a statement by a prosecution witness may involve an attack upon the witness' credibility. Impeaching one's own witness is not a very welcome situation and is one that should be avoided if at all possible. The mere fact that an accomplice is not prosecuted is similarly not significant. Many reasons, some meritorious and some fatuous, can exist for a failure to prosecute. An unrebutted statement of a witness, an unexplained failure to prosecute or even both these situations should not be sufficient grounds for an appellate court to find that a grant of immunity exists. To conclude that an immunity grant does exist is mere speculation and appears to be an example of unwarranted solicitude for the accused rather than the product of sound legal analysis.[120]

B. THE SUBORDINATE PROBLEM

In 1971, for the first time, the Court of Military Appeals discussed the effect on the convening authority of a subordinate's grant of im-

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[117] United States v. Williams, 21 U.S.C.M.A. 292, 298, 45 C.M.R. 66, 72 (1972).
[118] United States v. Moore, 50 C.M.R. 432 (AFCMR 1975).
[119] United States v. McMillan, 46 C.M.R. 997 (AFCMR 1973). The granting of significant clemency to a witness after he testifies will not by itself raise an inference that a clemency agreement exists. United States v. Welling, 49 C.M.R. 609 (ACMR 1974). See also United States v. Hines, 51 C.M.R. 214 (ACMR 1975).
[120] Hopefully, decisions holding that grants of immunity exist when in fact they may not are things of the past. The Court of Military Appeals has recently held that all grants of immunity or promises of leniency must be reduced to writing and a copy served on the accused before the pertinent witness testifies. United States v.

munity to a witness. It held that a convening authority was disqualified from taking the action in a case where the acting commander had in the convening authority's absence granted immunity to a witness.[121] It did so because it believed that the acting commander had vouched for the credibility of the witness when he granted immunity. Therefore, "it is asking too much of human behavior to expect . . . [the convening authority] . . . to be wholly free of the influence of the acting commander when weighing the evidence and judging the credibility of the witnesses."[122]

Two years later the Court of Military Appeals held that where a subordinate commander agrees, in return for testimony, to refer a witness' case to a special court-martial not empowered to adjudge a bad conduct discharge,[123] the general court-martial convening authority is disqualified from taking the action.[124] Chief Judge Darden concurred in the result and expressed the fear that the opinion might be interpreted as holding that the convening authority is disqualified any time a subordinate gives leniency or purports to grant immunity in return for testimony. He suggested that disqualification should not occur where the subordinate commander involved has little influence on the performance of the convening authority's duties.[125]

Less than six months later, it appeared that Judge Darden's fears were realized. In *United States v. Sierra-Albino*,[126] the special court-martial convening authority agreed to suspend any confinement adjudged at the witness' court-martial in return for testimony. The Court of Military Appeals held that the agreement and the subsequent testimony disqualified the general court-martial convening authority from taking the action. It stated:

> [W]henever a convening authority learns a subordinate has vouched for the credibility of a witness by extending immunity, it is still asking too much of

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Webster, 24 U.S.C.M.A. 26, 51 C.M.R. 76 (1975); *see* United States v. Killen, 43 C.M.R. 865 (NCMR 1971); *cf.* United States v. Taylor, 46 C.M.R. 962 (ACMR 1972).

[121] United States v. Maxfield, 20 U.S.C.M.A. 496, 43 C.M.R. 336 (1971).

[122] *Id.* at 498, 43 C.M.R. 338.

[123] In the Army only a general court-martial convening authority may convene a special court-martial authorized to adjudge a bad conduct discharge. *AR* 27-10, para. 2-166.

[124] United States v. Dickerson, 22 U.S.C.M.A. 489, 47 C.M.R. 790 (1973).

[125] The Chief Judge wrote:

> My disagreement with the principal opinion is that I believe it is susceptible of the interpretation that any promise not to prosecute or purported grant of immunity by any commander subordinate to the convening authority is enough to disqualify the convening authority from reviewing and acting on the record. The basis for our holding in United States v. White, 10 U.S.C.M.A. 63, 27 C.M.R. 137 (1958), and subsequent cases is that the convening authority's involvement in granting immunity to a prospective witness amounts to a prejudgment of the witness's credibility. I do not believe that it should be extended to action by subordinate commanders that can have little or no impact on the performance of the convening authority's duties.

Id. at 491, 47 C.M.R. at 792.

[126] 23 U.S.C.M.A. 63, 48 C.M.R. 534 (1974).

> the convening authority to free himself wholly of the influence of his subordinate's judgment in his own review and action upon the case.[127]

The rule espoused in ***Sierra-Albino*** has been given wide application.[128] It appears that neither the grade nor the position of the subordinate nor his physical location will prevent disqualification. Thus the Commanding General of the 12th Air Force was disqualified from taking the action when a base commander several hundred miles away in another state promised clemency to a witness in return for testimony.[129] Moreover, a battalion commander's promise of clemency to a witness will disqualify the convening authority even if he is the commander of a large military installation.[130] Similarly, it has been held that a company commander can disqualify the commanding general by promising not to prosecute witnesses in return for testimony.[131]

The reverse of the ***Sierra-Albino*** situation also leads to disqualification. Thus where a commander grants immunity and then is absent from the command on the day the action is taken, the acting commander is disqualified from taking the action.[132]

Although the disqualification by subordinate action rule is liberally applied, one court has sought to limit its application to only those cases in which the subordinate is in a command relationship with the convening authority. Thus it has been held that a grant of immunity by the Commander, Fleet Activities, Yokuska, Japan, does not disqualify the Commander, U.S. Naval Forces, Japan, because no command relationship exists.[133]

The limitation to those instances involving a ***command*** relationship is of doubtful validity. Many activities of commanders spread across command lines and it is very possible to find a com-

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[127] *Id.* at 64, 48 C.M.R. at 536.

[128] In addition to those cases cited in this article, see United States v. Ward, 23 U.S.C.M.A. 572, 50 C.M.R. 837 (1975); United States v. Espiet-Betancourt, 23 U.S.C.M.A. 533, 50 C.M.R. 672 (1975).

[129] United States v. Chavez-Rey, 23 U.S.C.M.A. 412, 50 C.M.R. 294 (1975). The Commanding General, 12th Air Force was located at Bergstrom Air Force Base. Austin, Texas. The base commander was stationed at Holloman Air Force Base, New Mexico.

[130] The decision of the Court of Military Review holding that the convening authority was not disqualified was reversed in a per curiam opinion which cited *Sierra-Albino.* United States v. Holton, 23 U.S.C.M.A. 186, 48 C.M.R. 802 (1974). The disqualified convening authority was the Commanding General, Camp Lejeune, North Carolina. The facts are set out in the Court of Military Review opinion, see 48 C.M.R. 712 (NCMR 1974). *See also* United States v. Cruz, 23 U.S.C.M.A. 238, 49 C.M.R. 291 (1974).

[131] United States v. Neal, CM 432298 (ACMR 22 July 1975) (unpublished). The convening authority was the Commanding General, Fort Knox, Kentucky.

[132] United States v. Hurd, 49 C.M.R. 671 (ACMR 1974).

[133] United States v. Jackson, 49 C.M.R. 344 (NCMR 1974).

mander dealing more with the subordinates of others than with his own. Indeed, in United States Army Europe the officer exercising general court-martial jurisdiction over an individual is determined by the location of the individual's unit and not by command lines. By strictly following the chain of command, situations would inevitably arise where senior officers have granted immunity or made promises of clemency and the convening authority would not be disqualified from taking the action even though he has frequent official contact with those officers. Therefore, it is Submitted that limiting the ***Sierra-Albino*** rule to those cases involving the chain of command is an application of the letter but not the spirit of the law.

> The common theme in these cases is a recognition that in the circumstances therein the reviewing authority cannot help but look upon the witness' testimony partly through the eyes of his subordinate. The patent judgment by his subordinate that the testimony he had bargained for is valuable and credible may thus say to the reviewing authority that he too should believe it.[134]

The conclusion that he who grants immunity or promises clemency vouches for the credibility of the witness is questionable. One of the major purposes of immunity statutes is to overcome "the refusal of accomplices to testify about a crime, thereby aborting a conviction."[135] "Often immunity is utilized where no other legal means appears to be available or practical to ferret out facts best known to the culpable witnesses."[136] The Court of Military Appeals has recognized that grants of immunity are used "as a means to compel testimony from an uncooperative witness."[137] It is submitted that where witnesses are recalcitrant or uncooperative or where many witnesses are culpably involved but the degree of culpability is not clear, grants of immunity are not given because the grantor believes the witnesses to be credible. They are given to ascertain the truth. Once the compelled information is received, then and only

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[134] United States v. Bartee, 50 C.M.R. 51, 56 (NCMR 1974). Bartee was charged inter alia with disrespect and disobedience in violation of Articles 89, 90 and 91 of the Uniform Code of Military Justice. On appeal it was alleged that the convening authority was disqualified from taking the action because an immediate subordinate of the convening authority was a prosecution witness. The court rejected the argument and held that this situation was unlike Sierra-Albino because no act preceded the testimony of the witness which indicated that a subordinate vouched for the credibility of the witness. One possible explanation for the decision was the court's concern for the practical problems that would be generated if convening authorities were disqualified in all such cases. This concern probably motivated the court to decide the cases as it did. As a practical decision, *Bartee* is probably correct; but it illustrates the difficulties which may occur if the rule is extended.

[135] United States v. Wilson, 488 F.2d 1231, 1233 (2d Cir. 1973).

[136] United States v. First Western Bank, 491 F.2d 780, 783 (10th Cir. 1974); see United States v. Rivera, 23 U.S.C.M.A. 430, 50 C.M.R. 389 (1975).

[137] United States v. Webster, 24 U.S.C.M.A. 26, 30, 51 C.M.R. 76, 80 (1975).

then can its truthfulness be determined. Moreover, in the military the grantor cannot dictate the testimony he wants given. He can only compel the witness to speak the truth, whatever it may be.[138] If the granting of immunity can be compared to a bargain,[139] one side, the grantor, is giving valuable consideration without knowing what he will receive in return. It is submitted that the basis of the *Sierra-Albino* rule that the convening authority *ipso facto* gives credence to testimony secured by a subordinate's grant of immunity is erroneous. It should be overruled[140] or severely limited to those cases in which the practicalities of life indicate that the grantor has in fact vouched for the credibility of the witness and in which the convening authority has in fact considered this judgment of credibility. The rule as it is now applied is at war with common sense and is not in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men . . . act."[141]

C. DISQUALIFICATION OF THE STAFF JUDGE ADVOCATE

The post-trial review[142] of the staff judge advocate must be fair and impartial. Prior to 1971 it had been settled that the staff judge advocate who participated in the granting of immunity or was instrumental in a promise of clemency to a witness was disqualified from rendering the review.[143] He was disqualified because his prior activity indicated a prejudgment of the credibility of the favored witness and therefore "precluded [him] from rendering an unbiased and unimpassioned review."[144]

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[138] *See, e.g.*, United States v. Conway, 20 U.S.C.M.A. 99, 42 C.M.R. 291 (1970); United States v. Stoltz, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964); United States v. Scoles, 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963); United States v. Tucker, 50 C.M.R. 143 (AFCMR 1975); United States v. Gilliam, 47 C.M.R. 649 (ACMR 1973); United States v. Thibeault, 43 C.M.R. 704 (ACMR 1971).

[139] *See* United States v. Tramunti, 500 F.2d 1334, 1342 (2d Cir. 1974).

[140] The Court of Military Appeals has recently been very willing to change existing rules of law, even those of long standing. *See, e.g,* United States v. McOmber, 24 U.S.C.M.A. 207, 51 C.M.R. 452 (1976); United States v. Moseley, 24 U.S.C.M.A. 173, 51 C.M.R. 392 (1976); United States v. Hughes, 24 U.S.C.M.A. 169, 51 C.M.R. 388 (1976); United States v. Ware, 24 U.S.C.M.A. 102, 51 C.M.R. 275 (1976); United States v. Dohle, 24 U.S.C.M.A. 34, 51 C.M.R. 85 (1975); United States v. Jordan, 23 U.S.C.M.A. 525, 50 C.M.R. 664 (1975); United States v. Graves, 23 U.S.C.M.A. 434, 50 C.M.R. 393 (1975).

[141] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[142] UCMJ arts. 61, 65.

[143] United States v. Cash, 12 U.S.C.M.A. 708, 31 C.M.R. 294 (1962); United States v. Gilliland, 10 U.S.C.M.A. 343, 27 C.M.R. 243 (1959); United States v. Albright, 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958).

[144] United States v. Albright, 9 U.S.C.M.A. 628, 26 C.M.R. 408, 413 (1958).

The disqualification rule has now been extended to include situations in which the staff judge advocate may not be personally involved. In United States *v.* ***Diaz***,[145] the deputy staff judge advocate offered to recommend that an individual's sentence be reduced if he testified against the accused. The witness agreed and the staff judge advocate recommended approval of the agreement. The Court of Military Appeals held that the recommendation of the staff judge advocate indicated a prejudgment of the credibility of the witness and disqualified him from writing the review. More significant than the holding was the court's stated belief that the staff judge advocate's office has a "unitary function."[146] Accordingly, it seemed to suggest that any promise of clemency to a witness by a member of the prosecutorial side of the office would disqualify the staff judge advocate from the review process.[147]

Subsequent cases[148] suggest that the "unitary function concept" is the test which governs the disqualification of the staff judge advocate. Thus where the trial counsel promises clemency[149] or promises to recommend clemency[150] for a witness in return for testimony, the responsibility for the agreement will be imputed to the staff judge advocate.[151]

When the staff judge advocate is disqualified from writing the review, it appears that all the members of his office are similarly disqualified. Therefore, once immunity is granted to a witness which disqualifies the staff judge advocate, neither the deputy staff judge advocate nor any other member of the office may sign the review as acting staff judge advocate.[152] Similarly, a judge advocate on the staff of a disqualified staff judge advocate may not write a review which is subsequently adopted by a staff judge advocate who is not disqualified.[153]

V. CONCLUSION

Although the constitutionality of use immunity has now been

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145 22 U.S.C.M.A. 52, 46 C.M.R. 52 (1972).
146 *Id.* at 57, 46 C.M.R. 57.
147 But ***see*** United States v. Ravenel, 48 C.M.R. 193 (AFCMR), ***petition denied,*** —U.S.C.M.A.—, 48 C.M.R. 1000 (1974).
148 United States v. Sierra-Albino, 23 U.S.C.M.A. 63. 48 C.M.R. 534 (1974); United States v. Hayes, 51 C.M.R. 528 (ACMR 1975); United States v. McMath, 46 C.M.R. 1247 (ACMR 1973).
149 United States v. Sierra-Albino, 23 U.S.C.M.A. 63, 48 C.M.R. 534 (1974); United States v. McMath, 46 C.M.R. 1247 (ACMR 1973).
150 United States v. Hayes, 51 C.M.R. 528 (AMCR 1975).
151 In ***Sierra-Albino*** the court suggested that if the clemency agreement "was negotiated solely by the prosecutor without the blessing of the superior legal officer" the staff judge advocate might not be disqualified. 23 U.S.C.M.A. at 65, 48 C.M.R. at 536. It is submitted that the likelihood of such an agreement being consummated without the knowledge of the staff judge advocate is almost nonexistent.
152 United States v. Hurd, 49 C.M.R. 671 (ACMR 1974).
153 United States v. James, 51 C.M.R. 357 (AFCMR 1975).

settled, several questions remain unresolved. The foreign jurisdiction issue and the contours of derivative use are but two of these. In addition to these issues, military immunity law needs to discover an answer to the disqualification of the convening authority. As indicated above, holding that he is disqualified from the review process when he or his subordinate grants immunity is not a realistic solution. Moreover, when an appellate court finds such a disqualification the result is needless delay[154] and unnecessary expense. The major problem in military immunity law is the disqualification of the convening authority. The solution to that problem, by requiring disqualification only where the grantor has vouched for the credibility of the witness and where this judgment has been considered by the reviewer, would greatly aid the military criminal justice system. Moreover, it would do so at no expense to the essential rights to which the individual is entitled.

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[154] *See* MCM, 1969, **para. 84.**

THE APPLICABILITY OF THE LAWS OF LAND WARFARE TO U.S. ARMY AVIATION*

Captain Steven P. Gibb**

I. INTRODUCTION

Article 1 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land, to which the United States is a high contracting party, requires that "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land . . . ."[1] There are two possible interpretations of this requirement. The first is that it requires that any instructions or orders given to troops must be in conformity with the law of land warfare. The second interpretation is that the troops must be instructed on the subject of the law of land warfare. Regardless of the proper interpretation, it is not possible to comply fully with Article 1 of the Hague Convention of 1907 unless certain questions can be answered.

This article is primarily concerned with the following question: Are the existing customary and codified rules of land warfare sufficient to regulate the conduct of combat operations of Army Aviation forces? Significant issues subsumed by this larger question include whether a policy or theoretical basis exists that would justify any deviation from the principles underlying the law of land warfare when formulating doctrine or drafting rules for air combat;

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[1] Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 36 Stat. 2277, T.S. No. 539.

whether air warfare poses any unique problems in the application or enforcement of standards inherent in the principles underlying the law of land warfare; and whether the practice of states, with respect to air warfare, has established customary law in .air warfare inconsistent with the rules of land warfare.

These issues will be analyzed in the following manner. First, a brief statement about the purposes and sources of the law of war is necessary to provide basic assumptions and definitions for this inquiry. The body of this article will then be devoted to an analysis of justifications given for separate or different rules and standards for air warfare. Although an attempt will be made to deal separately with justifications which stem from different theoretical bases, from practical problems of application and enforcement or from the practice of states, frequently these justifications involve a mixture of concepts. Finally, the article will present conclusions concerning how the United States Army should respond to the fact that a substantial portion of its combat operations seems not to be covered by its manual on the law of land warfare.

A. PAST ARMY POLICY

The policy of the United States Army, at least since the Civil War, has clearly recognized that the law of land warfare is legally binding on the operations of U.S. forces. The famous Lieber Code was promulgated in 1863 as General Order No. 100, entitled "Instructions for the Government of the Armies of the United States in the Field."[2] This code was one of the first efforts to draft a system of specific rules of conduct for the soldier in the field that embodied the existing customary law of war. The Lieber Code was widely admired by European scholars and was partially integrated into the Hague Conventions of 1899 and 1907.[3] Spaight, one of the earliest English writers on the law of aerial war, commented in 1911:

> This was a very remarkable manual of Instructions for the Government of the Armies of the United States in the Field which was drawn up by Professor Lieber, on Mr. Lincoln's initiative and which **is** not only the first but the best book of regulations on the subject ever issued by an individual nation on its own initiative. Its principles and its philosophy are sound, elevated and humane.[4]

B. PRESENT ARMY DOCTRINE

More recently, other instructions on the law of land warfare have been drafted and issued to field commanders. The current United

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[2] *See* THE LAW OF WAR: A DOCUMENTARY HISTORY xvii (1972).
[3] *See id.*
[4] J. SPAIGHT, WAR RIGHTS ON LAND 14 (1911).

States Army statement of the rules which comprise the law of land warfare is contained in a field manual entitled ***The Law of Land Warfare.***[5]

The Manual was drafted and issued a relatively short time after the U.S. Army Air Corps was separated from the Army to become the U.S. Air Force. Consequently, the Manual states:

> Although certain of the legal principles set forth herein have application to warfare . . . in the air as well as to hostilities on land, this Manual otherwise concerns itself with the rules peculiar to. . . aerial warfare only to the extent that such rules have some direct bearing on the activities of land forces.[6]

It is difficult to conceive of a more ambiguous statement regarding the relationship of the law of land warfare to aerial warfare. It is likely that the Army intentionally avoided a clear and definitive formulation of this relationship in order to forestall doctrinal disputes with the Air Force. Moreover, the small number of aircraft operated by the Army in the early 1950's probably did not seem to present a substantial legal problem for those persons concerned with insuring the Army's adherence to the law of war.

C. RECENT GROWTH OF ARMY AVIATION

After the creation of the United States Air Force, the Army of the 1950's kept only a few small aircraft which were to be used mainly for medical evacuation of combat casualties and the adjustment of artillery fire by aerial observers. The Manual's avoidance of comment on aerial warfare did not anticipate the later growth of United States Army aviation. By 1975 the United States Army operated 9,469 aircraft of various types, a number which approaches the total number of aircraft held by its sister service, the United States Air Force.[7] Casualty statistics during the Vietnam war are another measure of the growth of aviation in the Army. By the end of 1971 the Army had suffered 2,226 air related deaths, while the Air Force had suffered 746, the Navy 217 and the Marine Corps 586.[8] It seems clear that the extent of the Army's concern with aviation operations has radically changed since Field Manual 27-10 was issued.

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[5] U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter cited as Manual in text and FM 27-10 in footnotes].

[6] *Id.* at 3.

[7] Figures supplied by the Office of the Deputy Chief of Staff for Logistics and taken from the Army Aircraft Inventory Statutes and Flying Time Report on 30 September 1975. The figures represent aircraft operated by all of the components of the United States Army. The total includes 854 fixed wing aircraft and 8,615 helicopters.

[8] R. LITTAUER & N. UPHOFF, AIR WAR STUDY GROUP: THE AIR WAR IN INDOCHINA 282 (rev. ed. 1972).

D. THE PROBLEM: THE TREATMENT OF AERIAL WARFARE IN FM 27-10

One might argue that there really is no substantial legal problem for Army Aviation because the Manual does concern itself with the rules of aerial warfare "to the extent that such rules have some direct bearing on the activities of land forces."[9] There are several difficulties with this argument.

First, it begs the question as to whether the rules of aerial warfare are somehow different from those which apply to land combat. If there are differences, do they lie in the formulation of the rules or in the application of the rules, or are the rules based on different underlying standards? The Manual's only specific reference to a subject that would generally be thought of as aerial warfare is where it states that there "is no prohibition of general application against bombardment from the air of combatant troops, defended places, or other legitimate military objectives."[10]

Second, the Manual's approach becomes doubly confusing when a brief review of literature on air warfare reveals the existence of wholly contradictory opinions. For example, shortly after the close of World War II, the chief of the wartime British Bomber Command concluded: "In the matter of the use of aircraft in war, there is, it so happens, no international law at all."[11] This view stands in direct opposition to the view that although

> . . . the determination of what in specific contexts may legitimately be regarded as a military objective involves some difficulties, air warfare would not appear to present any unique issues: the purpose and level of destruction obtained are of prime importance to legal policy, not the modality of delivery.[12]

Third, many of the operations or activities of United States Army aviation elements no longer fit in the original concept that they be "directly related to the activities of land forces." A few of the tasks that Army aircraft elements are capable of performing and have performed that are no more "directly related to the activities of land forces" than the ordinary combat operations of the Air Force include:

1. Firing missiles and other air launched munitions at targets of

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9 FM 27-10, ***supra*** note 5, at 3.
10 *Id.* at 20.
11 **A.** HARRIS, BOMBER OFFENSIVE 177 (1947).
12 M. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 317 (1960) [hereinafter cited as MCDOUGAL & ASSOCIATES].

opportunity discovered during reconnaissance flights over hostile areas;

2. Adjusting the impact of close air support munitions, ground launched missiles, artillery fire and naval gunfire by direct observation from the air;
3. Gathering radar, infra-red and photographic data to be used for bombardment of targets located at great distances from friendly ground forces;
4. Rescue of downed air crew members from hostile areas;
5. Plotting the location of radio transmitting sites for intelligence assessments and possible destruction by aerial bombardment;
6. Providing transportation for cargo and personnel in the combat zone.

With the exception of maintaining air superiority over the combat zone,[13] it is difficult to see a substantive legal difference in the nature of the air related tasks performed by the United States Air Force and the United States Army. The differences that exist are ones of degree rather than kind.

Fourth, even if the position of the United States Army were clarified by a declaration that those activities of aviation that are directly related to the activities of land forces are governed by the law of land warfare as it appears in the Manual and those aviation activities that are not directly related to the activities of land forces are governed by the laws of air warfare, Army air crewmen would still be without clear guidance. While some activities would clearly fall in the "directly related to" or in the "not directly related to" category, many Army aviation missions would not be so clearly categorized, particularly where a single mission includes different kinds of activities.

Fifth, assuming the doubtful proposition that a rational distinction can be drawn on the basis of whether a particular activity is included within the ambit of the Manual's language "have some direct bearing on the activities of land forces," those aviation activities outside the scope of the Manual would be unregulated because there is presently no separate body of rules for aerial warfare.[14]

Insofar as it can be determined, no other document has been issued by any of the United States Armed Forces that would in-

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[13] Even here Army combat forces play a limited role through their air defense capability.

[14] In response to Department of Defense Directive No. 5100.77 (5 Nov. 1974) entitled "DOD Law of War Program," the U.S. Air Force is currently drafting a manual that will serve as the aerial counterpart to Field Manual 27-10. The content of this manual and the anticipated date of publication are currently unknown.

dicate the existence of a separate doctrine or body of rules for aerial combat. As late as 1970, "the United States Air Force crewman, about to enter a combat theater, [was] still referred officially to the *Army Field Manual* for official instructions."[15]

Sixth, and perhaps the gravest problem with the Manual statement, is that it contains so many ambiguities that it can be used to support almost any position with respect to the law of aerial warfare. For example, does the assertion that certain legal principles apply mean that some principles do not apply? Which ones do not apply? Does the word "rules" refer to underlying substantive concepts such as "unnecessary destruction" or does it refer to procedural concepts such as "identification of combatants" which would obviously be different for ships, airplanes and infantrymen? Does "concerns itself with the rules peculiar. . . to aerial warfare" mean that some aerial warfare rules are included in the Manual? Or does it mean that aerial combat that has a direct bearing on the activities of land forces is governed by the law of land warfare? Unfortunately, the text of the Manual does not further clarify these issues.

II. PURPOSE AND SOURCES OF THE LAW OF WAR

A. REGULATION OF INTERSTATE COERCION

The law of war attempts to regulate interstate coercion where that coercion involves past, present or the potential use of violence.[16] By definition, it is international law. A preliminary question is whether international law is law at all. There is no universal agreement on the proper answer to this question; however, it is probably fair to say that a person's general jurisprudential view of what law is will determine whether he views international law as being real law. Opinions range from the assertion "that international law is not law at all but mere rules of international morality, . . . [to the other extreme] that international law dictates the content of national law."[17]

B. CRIMINAL RESPONSIBILITY UNDER THE LAW OF WAR

While some writers argue that the international law of war is not

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[15] DeSaussure, *The Laws of Air Warfare: Are There Any?*, 5 INT'L LAWYER 529, 531 (1971) [hereinafter cited as DeSaussure].

[16] *See generally* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 71 (1961) [hereinafter cited as MCDOUGAL & FELICIANO].

[17] MCDOUGAL & ASSOCIATES, *supra* note 12, at 160.

law, for purposes of determining the legality of actions of the armed forces of the United States it is law in every respect. Under the Constitution, the Congress is empowered to make rules for the government of the nation's military forces[18] and to define and punish offenses against the law of nations.[19] The Supreme Court has noted that "the Court is bound by the law of nations which is part of the law of the land."[20]

While the law of nations is encompassed in the national law of the United States, it is the President, through his position as Commander in Chief of the Armed Forces[21] and through his executive responsibility to enforce the law,[22] who must insure the armed forces' adherence to the law of nations:

> The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.[23]

Promulgated by the executive branch, the Department of the Army Field Manual entitled ***The Law of Land Warfare*** provides by its own terms "authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land.. . ."[24] The Manual is highly regarded by almost all commentators on the law of war. It states that "treaty provisions quoted herein will be strictly observed and enforced by United States forces ***without regard to whether they are legally binding upon this country.***"[25] Later, the text continues by noting that

> treaties relating to the law of war have a force equal to that of laws enacted by the Congress. Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof. . . .[T]he unwritten or customary law of war is binding on all nations. It will be strictly observed by United States forces. . . .[26]

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[18] "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces; . . . ." U.S. CONST. art. I, § 8, cl. 14.
[19] "The Congress shall have Power . . . To define and punish . . . offenses against the Law of Nations;..." U.S. CONST. art. I, § 8, cl. 10.
[20] The *Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).
[21] U.S. CONST. art. II, § 2.
[22] "The executive Power shall be vested in a President of the United States of America. . . ." U.S. CONST. art. II, § 1; "[The President] shall take cars that the laws be faithfully executed . . ." *Id.* art. II, § 3.
[23] ***Ex parte*** Quirin, 317 U.S. 1, 26 (1942).
[24] FM 27-10, *supra* note 5, at 3.
[25] *Id.* at 7 (emphasis added).
[26] ***Id.***

C. IMPLEMENTATION OF THE LAW OF WAR

Implementation of the Manual's provisions, with respect to United States forces, has been accomplished through the administration of the municipal criminal law of the U.S. Armed Forces which is embodied in the *Uniform Code of Military Justice*. For example, the killing of a prisoner of war would be prosecuted and punished under the article of the *Uniform Code of Military Justice* that prohibits murder.[27] In the case of war crimes that do not violate municipal law, Article 18 of the Uniform Code provides that "General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[28]

D. INTERNATIONAL LAW DEFINED

Even though the Congress of the United States incorporated the law of war into the criminal code of the Armed Forces, there remains a general problem as to whether the law of war is inferior to, equal to or superior to a nation's municipal law where there is a conflict between the two. With regard to this issue Kelsen states that:

> The choice between primacy of international law and the primacy of national law is, in the last analysis, the choice between two basic norms. ..It may be that our choice...is guided by ethical or political preferences. A person whose political attitude is that of nationalism and imperialism may be inclined to accept as a hypothesis the basic norm of his own national law. A person whose sympathy is for internationalism and pacifism may be inclined to accept as a hypothesis the basic norm of international law and thus proceed from the primacy of international law.[29]

Because an exhaustive discussion of jurisprudential questions concerning the nature of international law is beyond the scope of the present inquiry, the following statement is adopted without further support. "In order to facilitate their relations *inter se,* states have accepted a code of conduct which they regard as binding upon themselves, which they consider ought to be obeyed, and in respect of breaches of which they are prepared to tender apologies, make reparation, or go to court, as the case may be."[30] It follows, therefore, that international law is "that system of laws and regulations which those who operate on the international scene recognize as being necessary for their orderly conduct, and which

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[27] UNIFORM CODE OF MILITARY JUSTICE art. 118, 10 U.S.C. § 918 (1970)[hereinafter cited as UCMJ].
[28] UCMJ art. 18.
[29] H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 446 (1952).
[30] L. GREEN, LAW AND SOCIETY 172 (1975). For further discussion on the question of whether international law is law, see *id.*, ch. 3, at 133.

they recognize as being binding upon themselves in order to achieve that orderly conduct."[31] This definition of international law leads to a clearer perception of relevant policies, based on common interests or shared values that are intended to be enhanced by observation of the law of war.

E. LAW OF WAR BASED ON SELF-INTEREST

Self-interest is probably the predominant motive inducing states to abide by the law of war. This proposition may be illustrated by the following example from World War II. Captured documents from the German army revealed that the Operational Staff of the Armed Forces [Wehrmacht] evaluated a proposal for Germany to denounce all of its obligations under the laws of war during the latter stages of the war. The international conventions to which Germany was a party were closely scrutinized and the ramifications of renunciation were quantified by comparing the expected advantages and disadvantages of such a course of action. The staff "uniformly concluded that the disadvantages far outweighed possible advantages."[32]

Many of the policy objectives that the laws of war are intended to further are fundamentally based on a state's self-interest. Examples of these objectives are:

1. Securing reciprocal treatment. If your own forces observe the law of war, it is more likely that the enemy forces will also observe the law when they come in contact with your armed forces or civilian population.
2. Encouraging future observance of the law. A lack of respect for the law of war in one conflict may be treated as precedent for lesser standards in later or separate conflicts.
3. Retaining domestic and foreign public support. There is little doubt that war crimes can cause loss of support of national objectives in the conflict.[33]
4. Promoting unity. Where the legality of the acts of some members of a nation's armed forces is in question, there may be a resulting loss of morale.
5. Reducing undue enemy hostility. If one nation's forces commit

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[31] ***Id.*** at 173.
[32] MCDOUGAL & ASSOCIATES, ***supra*** note 12, at 291.
[33] For example, reports of possible war crimes committed in Vietnam by United States troops were taken by many citizens as proof that the United States was conducting the war in an illegal fashion. Whether or not this was true, there is little doubt that an event such as the killings at My Lai undercut support for United States policy.

war crimes, enemy forces may be induced to feel that their only real choice is to continue the fight and resist to the bitter end.[34]

6. Facilitating restoration of peace. Lack of respect for the law of war creates distrust in the willingness of the offender to abide by future agreements after the conflict has ended.
7. Promoting the state's objectives in the conflict. Violations of the law of war are counterproductive where they may "intensify propensity for combat, drain off guilt feelings (in the case of a belligerent denounced by the general community as an aggressor), build up a desire for revenge, and enhance work diligence."[35]

It seems clear that self-interest can provide a firm basis for a nation's commitment to honor the law of war. However, there still remains the task of determining specifically what the law of war is with respect to a specific combat situation. For this determination one must resort to an examination of international treaties, the customary practice of states, the general principles of law recognized by civilized nations, the writings of legal scholars and the learned treatises of publicists.

F. BASIC PRINCIPLES

Before legal issues concerning specific combat situations can be considered, one further preliminary matter should be reviewed. From the earliest writers on the subject of the law of war to the most recent, there seems to be wide agreement that there are three general principles underlying the formulation of rules for the law of war. Those principles are:

1. military necessity,
2. humanity, and
3. chivalry.[36]

The process of authoritative decision making in the law of war field is a constant effort to strike a reasonable balance between these principles.

1. Military Necessity

The term "military necessity" has usually been thought to embrace the idea of "permitting the exercise of that violence necessary for the prompt realization of legitimate belligerent objectives."[37]

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[34] MCDOUGAL & FELICIANO, ***supra*** note 16, at 656.
[35] *Id.* at 655.
[36] M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 313 (1959) [hereinafter cited as GREENSPAN].
[37] MCDOUGAL & FELICIANO, ***supra*** note 16, at 524.

This principle does not, however, permit disregard for the law of war simply because the military mission would be made more difficult by adherence to the law. The German *kriegraison* doctrine was advanced to justify disregard for the law of war in this situation, but courts[38] and legal scholars have rejected this reasoning. Greenspan states:

> The rules of war make allowance within their framework for military necessity, which cannot transcend the rules themselves. . . . and the individual rules themselves indicate to what extent they may be modified under the stress of military necessity. In this connection, it will be noted that some rules are absolute prohibitions, while others are conditional prohibitions.39

It is a generally accepted principle that the legality of any particular exercise of violence is "hardly susceptible of precise quantification and measurement."[40] Moreover, the concept of regulated violence "embraces two related but distinguishable requirements: one of relevancy and the other of proportionality."[41] Destruction is irrelevant and therefore not permissible when it is not directed at the achievement of a legitimate objective. Proportionality refers to the relationship "between the amount of destruction effected and the military value of the objective sought. . . ."[42] Some commentators criticize the "proportionality" standard as being unworkable in aerial warfare because it does not give the air crew a basis for deciding when it is lawful to destroy a target.[43] Others suggest that the standard must be subjective and argue that lawyers should be as willing to work with subjective legal standards such as "proportionality" in the international legal system as they are with domestic subjective legal standards such as "reasonableness."[44]

2. Humanity

The concept of humanity as it relates to the law of war has been described in the following terms: "War is a political weapon, used to gain by force what cannot be settled by negotiation. Gratuitous suffering or cruelty as such is irrelevant to its purpose."[45] The principle of humanity compels adversaries to use the least coercive method necessary to achieve their objectives. McDougal and Feliciano describe humanity as importuning

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[38] United States v. List et al., Trials of the War Criminals 1253-54 (1949).
[39] GREENSPAN, *supra* note *36,* at 314.
[40] MCDOUGAL & FELICIANO, *supra* note 16, at 524.
[41] *Id.*
[42] *Id.*
[43] *See generally* DeSaussure, *supra* note 15.
[44] Adler, *Targets in War: Legal Considerations,* 8 HOUSTON L. REV. 1 (1970).
[45] GREENSPAN, *supra* note *36,* at 315.

> . . . much more than soft sentimentality or the mere reflection of contemporary prejudices on ethical questions to which this principle is sometimes assumed to refer. When conceived . . . as one manifestation of a profound preference—however justified in terms of religion, secular philosophy, sociology, psychology, or otherwise—for the shaping and sharing of values by noncoercive, rather than coercive, modes, the principle of humanity may be seen to be a basic postulate of any international law of human dignity.[46]

3. *Chivalry*

The third principle, chivalry, is perhaps the most suitable explanation for some anomalies that appear in the law of war. For example, while it is permissible to shoot at descending paratroopers, it is not permissible to shoot at crew members of disabled aircraft descending by parachute even though they are armed and are attempting to return to the safety of their own lines where they will be able to return in another aircraft to inflict more damage.[47] The rules based on chivalry tend to apply to the kinds of warfare where members of the upper social classes have been involved. The medieval code of chivalry applied only to combat between knights and not to peasant foot soldiers, pagans, or others of lower status.[48] During both world wars, because of the higher mental and physical standards required of aviators, the air forces of the warring powers contained a higher percentage of service members from the educated upper classes than did the ground forces. This circumstance probably accounts for the greater role chivalry seems to play in the rules for the conduct of air combat. However, "in an age increasingly marked by mechanized and automated warfare, the scope of application of chivalry as a principle distinct from humanity may very probably be expected to diminish in corresponding measure."[49]

III. LAW OF AERIAL WARFARE: THEORY AND PRACTICE

The literature on the law of aerial warfare has suggested several independent theories as to why air combat requires different standards. Some of the ideas which have been advanced are based on a perception that there is greater practical difficulty in applying the rules for the conduct of hostilities on land to aerial warfare. This section will describe some of these theories and the allegedly

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[46] MCDOUGAL & FELICIANO, *supra* note 16, at 529. *See generally* McDougal, *Perspectives for an International Law of Human Dignity*, 53 PROC. AM. SOC'Y INTL L. 107 (1959).
[47] FM 27-10. *supra* note 5, at 17.
[48] MCDOUGAL & FELICIANO, *supra* note 16, at 522.
[49] *Id.*

greater practical difficulties and then analyze whether air combat actually poses a unique problem that will justify different treatment.

A. BACKGROUND OF AIR DOCTRINE

In contrast to land and naval doctrine, most of the basic aerial warfare doctrine was formulated between the two world wars. It is useful to consider some of the factors facing those who argued for a greater devotion of national resources to the building of an air force.

The military establishment was thought to be largely responsible for the incredible loss of life in the trenches during World War I. The military losses for all sides including dead, wounded, missing and prisoner have been estimated at 37,500,000. The number of dead, civilian and military, was probably at least 20,000,000.[50] It was no exaggeration to say that countries like France, England and Germany lost a whole generation of men. Aside from the incredible losses which were suffered in the name of obscure justifications and in the attainment of doubtful results, the war in the trenches removed the romantic and chivalrous aspects of war from the public mind.

For these reasons the advocates of "airpower" hoped to sell to the public the idea that aerial combat was cheaper in lives and materiel. These individuals hoped to convince the public of the necessity for developing aerial combat strength because the military bureaucracy underrated the potential of aircraft and was unwilling to risk the funds involved in experimenting with aircraft, especially during the depression years. The primary argument of air enthusiasts was that because aircraft were used against key points they avoided the horror of the trenches. Aerial combat was also presented as the continuation of the tradition of chivalry and romance in war. Spaight, in 1924, wrote, "In air warfare more than its elder brethren of the land and sea, the heart and conscience of the combatants are the guarantees of fair fighting, not any rule formulated in a treaty or in a manual."[51] As an example of this tendency he remembered

> When the long row of hut hospitals, jammed between the Calais-Paris Railway at Etaples and the great reinforcement camp on the sand hills above it, was badly bombed from the air, even the wrath of the Royal Army Medical Corps against those who had wedged its wounded and nurses between two staple targets scarcely exceeded that of our Royal Air Force against war correspondents who said "the enemy must have done it on purpose."[52]

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[50] D. SHERMER, WORLD WAR I 249 (1973).
[51] *Quoted in* Colby, *Laws of Aerial Warfare,* 10 MINN. L. REV. 309, 314 (1926).
[52] *Id.* at 314 n.273.

B. LACK OF CRITICAL ANALYSIS

One wonders, when reviewing the literature, why some of the reasons given for different standards were not immediately and forcefully challenged. Undoubtedly, it is partly because relatively few of the experts in air or land combat had any understanding or interest in the opposite field. Most of the officers who became the leaders of the air forces began their careers as young officers in aviation during World War I. During the early years of the development of aviation there was a tendency to leave to a relatively few writers the analysis of international legal problems connected with aviation. This was in part due to the general perception of aviation as being a mysterious and dangerous business that could be understood only by those intimately acquainted with flying.

Even today the feeling persists that flying is different from other human endeavors. One author, in support of an air force independent of other services, recently wrote: "Somewhere, under some name, there must be a team of thinkers, managers and operators steeped in the air environment who understand the risks and returns from great speed, distance, and height from the surface of the earth to the depths of space with a sensory and intelligent appreciation for the aerospace experience."[53] The general reluctance to criticize what aviators or specialists in aviation said about flying led to a less than rigorous analysis of problems of the law of aerial warfare.

After the end of World War I the legality of some of the bombing practices was questioned because the accuracy of bombing during the war was so poor that the destruction was largely visited upon civilians. In answer, those who favored separate rules for aircraft cited poor weather and night visibility and great height as factors which reduced the aviator's accuracy in bombing. A typical quote is "an aviator cannot distinguish an art museum from an armory, or an arsenal from an academy."[54] A similar view is:

> How, it may well be asked, can an aviator who flies over a city at great height, especially during the night, when all lights are extinguished, as was the general practice during the World War, identify the persons and things which he is permitted to bombard? How can he distinguish between the military forces and the civil population; between military works, depots, and factories engaged in the manufacture of arms and munitions or used for military purposes, and other establishments engaged in the manufacture or production of articles used for civil purposes; or between railway lines **used**

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[53] Stiles, *Air Power*, 27 AIR U. REV. 55 (1975).
[54] Note, *Aerial Warfare and International Law*, *28* VA. L. REV. 524 (1942).

> for military purposes and those which are not? To require aviators to single out the one class of persons and things from the other and to confine their attacks "exclusively" to one of them will in many cases be tantamount to an absolute prohibition of all bombardment.[55]

Along the same line, it was claimed by many that antiaircraft fire forced aircraft to greater heights which resulted in poor accuracy. Of course, the real question is how the aviator's position is legally different from that of someone on the ground with similar difficulties. An artilleryman may increase his safety by firing from a greater distance. His accuracy will also be affected by distance, weather and visibility. He too will have difficulty distinguishing between targets. Although this question and these observations seem elementary, they are generally not discussed in any of the early literature on aerial warfare.

C. SUPERIOR FORM OF BATTLE

1. Strategic Warfare

Of those ideas put forward to justify different rules or standards of conduct for air combat, perhaps the most persistent and pervasive concept is that air combat is a superior form of battle because it allows the attack of key points in the adversary's system of defense. Therefore, if air forces are allowed to attack or destroy those critical points causing the collapse of the enemy, which incidentally may require the relaxation of the customary rules of warfare, the total loss of life and destruction of property will be substantially less. Spaight, in 1930, argued:

> It is a whole nation which wills and makes war today. The man in the street, the voter, not the soldier or sailor, is the master, the principal, the person to be impressed and won over. Air power can break his moral *[sic]*. If it does, armies and fleets will not matter. He will make peace over their heads, and he will make it quickly. The fighting front cannot stand if the "home front" cracks. All the long-drawn horrors of trench warfare, of mass slaughter, of the hunger blockade, will be avoided. Humanity will gain, because wars will be sharp and swift. After all, the technique of the warlike encounter, the campaigns and battles of the older warfare, the clash of champions in arms, was an indirect, roundabout, unscientific means of producing what is really a purely psychological result — the creation in the minds of the enemy citizens of a conviction of failure and hopelessness. The method which air power will employ is the direct, scientific, swifter and more effective way of reaching the same goal. It would be sheer folly not to try that way now that flight has made it possible.[56]

This type of war planning is normally called aerial strategic warfare. That is a misnomer. Presumably all forms of warfare utilize some kind of strategy. Aerial strategic warfare is neither first nor

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[55] Garner, ***International Regulation of Air Warfare,*** 3 AIR L. REV. 118 (1932).
[56] J. SPAIGHT, AIR POWER AND THE CITIES 117 (1930).

unique in the observation of the principles of war such as economy of force, sound target intelligence and conservation of resources. If this method of waging war is unique it is in that it allows the attack or destruction of targets that formerly had been forbidden. It is true that aerial warfare made it possible to attack targets that could not have been reached before, but it is not clear that the advent of aerial warfare caused any change in the legality of attacking targets of a particular nature.

2. Short Cut to Victory

Another, but similar, idea expressed by the early "air power" advocates is that aerial combat provided a "short cut" to victory. An extreme expression of this concept is that "airmen will be capable of forcing an enemy nation to accept defeat and to sue for peace without the use of armies."[57] While by today's standards this seems unrealistic, it is also true that this type of reasoning was implicit in the thinking that was the basis for the decision by the leaders of the United States to drop the two atomic bombs on Japan during the latter days of World War II. Furthermore, while some historians feel that the Japanese were ready to sue for peace anyway, many people continue to believe that the use of the atomic bombs did prevent the necessity of an invasion of the Japanese home islands.[58] Thus in the view of these persons the use of air power, specifically the dropping of the atomic bomb, avoided a far more costly battle on the land.

Whatever the merits of the view that the use of the atomic bomb shortened the war against Japan, it is no longer relevant that the bomb was delivered by the air force. Today land, sea and air forces are equally capable of launching nuclear missiles. Furthermore, the Second World War, Korean War and the Vietnam War experiences do not suggest that the use of air power alone can either shorten the conflict or reduce total deaths and destruction. The expectation of a fast and cheap "short cut" to victory through the use of air power has proven to be an illusion. A different or less restricted standard for aerial warfare cannot be justified on this basis.

3. The Decisive Arena

A third similar, but slightly different, idea put forward by early "air power" advocates was that in modem war aerial combat is the decisive arena. Therefore, "results so important as to be almost decisive–possibly fully decisive—are expected to follow its

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[57] *Id.* at 114.
[58] M. ARNVLD-FOSTER, THE WORLD AT WAR *276* (1973).

successful accomplishment."[59] More recently these ideas have been expressed:

> [T]he air force is the only strategic force, because it is the only force that can attain command of its own medium by its own combat resources.. . .[Also,] command of the air becomes the crux of war and an end in itself. . . .Only when undisputed command of the air has been established can these other military services carry out their mission of exploitation, on the surface, of a climactic decision won in the air.[60]

The authors of these views seem to hold that these truths are self-evident. There is, however, evidence to the contrary. The recent Southeast Asian experience involved extravagant use of air power by the forces fighting against North Vietnam. In no sense could aerial combat have been considered the decisive arena. Even if aerial combat does play a central or key role in a war, this fact by itself will not justify less restrictive standards for aerial warfare.

D. SEPARATENESS

In the early years the separateness of aviation operations from land and sea battle appealed to many as reason for establishing a separate code. Garner's view was that "Aerial Warfare differs essentially from both land and naval warfare and it is carried on in large measure independently of both. It must therefore be regulated in large measure independently from both."[61] The first airplanes could not communicate with ground forces or even with each other. Land and sea battle frequently occurred in foul weather or at night, while aircraft operations were limited to conditions of good visibility. It probably was accurate to say that air and ground operations were independent.

However, aircraft now fly in virtually any kind of weather or visibility. Military pilots can communicate with almost anyone with a radio. This includes everyone from the rifle platoon leader up to the Commander-in-Chief. Success in modern conflict may depend on how well the various ground, sea and air forces are coordinated in battle. In 1959, Schwarzenberger discussing the "advent, and already incipient decline, of air warfare as a separate form of warfare," stated:

> So long as the object of war is not the elimination of the enemy state as a distinct subject of international law . . .,the constant strategic object of war is the imposition of the victor's will on the government of the defeated enemy State. If everything else fails, this can be attained only by occupation of the enemy territory. Whether conducted by land, sea, or air, operations of this

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[59] J. SPAIGHT, AIR POWER AND THE CITIES 113 (1930).
[60] EMME, THE IMPACT OF AIR POWER 204 (1959).
[61] Garner, *International Regulation of Air Warfare*, 3 AIR L. REV. 115 (1932).

> kind must culminate in land warfare. Sea and air operations may be carried out in direct support of each other or of operations on land. They may also have as their immediate objective the command of sea or air. Yet both are but a means to an end.[62]

In the future the separateness of the operations and functions of land and aviation forces will continue to lessen due to the increased mobility of military forces, development of more sophisticated communication systems and the growing overlap of weapons systems. In spite of the intent or desire of the armed forces, role separation will be increasingly difficult to achieve.

It is, perhaps, an impractical distinction anyway. Each of the military services operates aircraft. Each can fire some types of missiles. These missiles can be fired from beneath, on, or above the land or sea surface. Contrary to the expectations of the early writers, the development of aerial warfare has moved towards closer integration with the conduct of land warfare. If there were really separate and independent modes of warfare, then arguably the law of war might be simplified by devising separate codes for land, sea and air forces. However, because the reverse situation exists, splitting the law of war into three separate codes would mean that each of the armed services would have to be concerned with the observation of two and perhaps three separate codes.

E. A DIFFERENT LOOK

In a curious variation on the theme that aviators cannot distinguish between targets in the same way that land forces can, Telford Taylor, U.S. Chief Counsel at Nuremburg, makes the following observation. "Things do not look the same from a jet bomber as they do on the ground, and the possibility of error is very great."[63] However "things [also] do not look the same" to the infantryman and the artilleryman. Since artillerymen and infantrymen are subject to the same legal standards, it is difficult to see the relevance of his point with regard to different legal standards for air crews. The visual perceptions of the actor may affect whether the standard is met, but the standard should remain the same. The difficulty of distinguishing specific targets is a relative problem.

Taylor destroys his own argument when he further writes about the use of aircraft in Vietnam:

> [H]elicopters and small observation planes go "squirrel-hunting" for individuals observed in the devastated areas, using machine-guns from the helicopters, and calling in air strikes — "sniping with bombs." This is using

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[62] Schwarzenberger, *The Law of Air Warfare and the Trend Towards Total War*, 8 AM. U.L. REV. 5 (1959).

[63] T. TAYLOR, NUREMBURG AND VIETNAM: AN AMERICAN TRAGEDY 142 (1971).

> the aircraft for the same purposes that the infantryman uses his gun, and the pilot ought to be held to the same standards of distinguishing combatants from noncombatants.[64]

At this point his analysis suffers. Is the purpose for which the weapon is used controlling? If so, aviators and soldiers should be governed by the same standards. The fact that the weapon is fired from a ground or aerial platform is immaterial. Proportionality and relevancy provide the legal standard applicable to both situations.

F. KILLING' IMPERSONALLY

Authors who believe that massive terror bombing is legitimate under international law sometimes raise the following question. "Is there any significant [legal] difference between killing a babe-in-arms by a bomb dropped from a high flying aircraft, or by an infantryman's pointblank gunfire?"[65] This question reflects the emotional reaction that might be expected from the parent of the dead baby. It ignores the fact that municipal law would also make legal and criminal distinctions based on how the baby was killed.

Those who ask the question assume that the conduct of land warfare will be governed by more restrictive rules than aerial warfare. In order to reconcile the apparent inconsistency in the application of the principles of the law of war, the following analysis is offered: If the customary law of war approves of the bombing of civilians in towns but does not approve of "ground forces . . . entering . . . towns with guns blazing, and killing off the infants who survived the bombing,"[66] the reason is that the "aviator's act is more impersonal than the ground soldier's."[67] According to Taylor, the legal distinction is based on the fact that:

> The Allied aviator over Berlin and the infantryman occupying a German town were in quite different situations. The aviator was attacking a functioning part of the German war machine with a weapon that could not discriminate among those in the target area, any more than could the captain of a ship participating in a naval blockade. The soldier was part of a force occupying conquered temtory, and was in a position to observe and discriminate among the inhabitants and fulfill his military functions without shooting babes-in-arms.[68]

This analysis is unacceptable. The answer to the first question as to whether there is a difference is that it depends on the intent of the actor and the circumstances. If both aviator and infantryman in-

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[64] *Id.* at 147.
[65] *Id.* at 142.
[66] *Id.*
[67] *Id.* at 143.
[68] *Id.*

tend to commit an act the probable result of which is the unnecessary killing of babies, then they are equally guilty. It should make no difference that a particular weapon can be operated from a distance that makes target distinction impossible by the naked eye. As far as the criminal law is concerned the important factor is whether the individual realizes the consequences of his actions and not whether or not he has the visual experience of seeing the results of his act.

The description of the situations of the Allied aviator over Germany and the infantryman is a false analogy. When planning a bombardment, one must establish the nature of the target and its military value compared to probable civilian losses and damage. A better illustration of the real issue is whether aerial bombardment is legally different from a long range ground artillery bombardment.

In further support of the position that air crews should be subject to the same standard as ground troops, consider other ordinary criminal law concepts. One of the methods for assessing the degree of culpability in criminal conduct has been to examine what pressures the individual was under prior to the crime.

Air crewmen generally lead a more comfortable life during war than infantrymen. They tend to be less subject to continuous combat stress than the ground soldier and may have far greater opportunity to contemplate the consequences of particular missions. For these reasons the ground soldier may have greater difficulty in meeting the appropriate standards of conduct during combat. Thus, from a public policy point of view, there is no reason to create lesser standards for the aviator, if indeed he should not be subjected to higher standards. The justification for less restrictive standards for aerial warfare based on the concept that killing from the air is less personal fails to withstand rigorous analysis.

G. TERROR ATTACKS

The question of whether it is permissible to bomb civilians indiscriminately was raised after the fact. During World War I, targets such as munition plants and rail centers located far behind the battle area were attacked by aircraft for the first time. Each of the countries involved claimed the targets attacked were important military facilities. Subsequently, the damage was determined to be mostly of a civilian nature. "The vast majority of the victims of these raids were non-combatants and large numbers of them were women and children."[69] General Pershing made an effort to

[69] Gamer, *International Regulation of Air Warfare*, 3 AIR L. REV. 112 (1932).

evaluate the military effect of bombing by aircraft in World War I. In 1924 he made his final report as Chief of Staff. In it, he said:

> Enthusiasts often forget the obligations of military aviation to other troops, and sometimes credit that service with ability to achieve results in war that have not received practical demonstration. . . .
>
> During the World War extravagant tales of havoc done to enemy cities and installations were often brought back, in good faith, no doubt, by some of our aviators, but investigation after the Armistice failed, in the majority of cases, to verify the correctness of such reports. Again, the damage done to the Allies by the enemy's bombing craft, including Zeppelins, was almost negligible even from a material point of view and in its effect upon the final results. Of course, some damage was done by aircraft bombing, and it would doubtless be somewhat greater in another war, but until it becomes vastly more probable than at present demonstrated, then it cannot be said that we are in position to abandon past experience in warfare.[70]

Statements of this nature posed a problem for advocates of an expanded role for aerial warfare. The diversion of military resources to areas far from the land battle had been justified on the grounds that it would be a direct benefit to the forces committed to the land battle. Aerial attack was supposed to destroy vital facilities that the military depended on and thus contribute to a feeling of hopelessness among the general population. When that occurred, the people would force their leaders to sue for peace.

The incidental deaths of civilians and destruction of civilian property from aerial attacks that theretofore had occurred only near the battle area were justified on similar grounds. The civilians and their property near the rear area targets were said to be in the same position as those located near the land battle.

Because there apparently was limited damage to military targets and relatively significant damage to civilian targets, a justification based on bombing targets of military value allowing only incidental civilian losses would not suffice. consequently, some writers began to focus on a more limited part of the original justification. They reasoned that the whole object of defeating armies in battle or destroying strategic targets in the rear areas was to bring about the collapse of the enemy's will to resist. Therefore aerial attack of civilian areas might be justified on the grounds that it destroyed the enemy's morale.[71]

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[70] *Quoted in* Colby, *Aerial War and War Targets*, 19 AM. J. INT'L L. 709 (1925).

[71] It is probably fair to say that one of the primary reasons that air power advocates advanced the target area or terror bombing theories is that they were acutely aware of the fact that bombing accuracy was incredibly poor. For example, during the bombing of the German industrial area along the Rhine Valley, the average distance from the assigned target to the point where the bombs hit was five miles. *See* R. HIGMAN, AIR POWER; A CONCISE HISTORY 136 (1972). It is not surprising that air power theorists argued for larger targets that would be easier to hit. In 1941, Lord Trenchard stated:

The legality and effectiveness of morale attacks[72] have been repeatedly debated since the end of World War I. Some theorists argued that morale attacks were a superior form of strategy which was appropriate for modern conflict. Douhet, a leading proponent of morale attacks wrote:

> Tragic, too, to think that the decision in this kind of war must depend on smashing the material and moral resources of a people caught in a frightful cataclysm which haunts them everywhere without cease until the final collapse of all social organization. Mercifully, the decision will be quick in this kind of war, since the decisive blows will be directed at civilians, that element of the countries at war least able to sustain.[73]

An attack on civilian morale is probably assumed to be part of a strategy that includes destruction of cities. The British Bomber Command in World War II concentrated on nighttime area bombing of cities. The German air force did the same after daylight bombing of airfields proved costly in men and airplanes. In each case, most historians agree that the policy behind the bombing was an attempt to terrorize the civilian population.

There is little doubt that this type of battle strategy is illegal under the existing law of land warfare. It violates treaties and the underlying principles of warfare. However, many writers thought that it was unlikely that there could be restrictions placed on aerial warfare "because there is a definite *military* advantage in bombing food supplies, communication centers, crops and civilian homes. There was no longer a line between military requirements and useless civilian damage."[74]

The logic of the morale attack strategy may be developed in the following way. It is permissible to attack targets of military value far from the battle area and cause incidental civilian losses. Destruction of the legitimate military targets will cause a failure of

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> If you are bombing a target at sea. then 99 percent of your bombs are wasted.. So. too. if your bombs are dropped in Norway. Holland. Belgium or France, 99 percent do Germany no harm, but do kill **our** old allies, or damage their property or frighten them or dislocate their lives ... If. however, our bombs are dropped in Germany, then 99 percent which miss the military target all help to kill. damage, frighten or interfere with Germans in Germany and the whole 100 percent of the bomber organization is doing useful work..

Quoted in Comment, *Protection of Civilians from Bombardment by Military Aircraft: The Ineffectiveness of the International Law of War*, 33 MIL. L. REV. 93, 103 (1966). This approach defines away any problems in bombing accuracy. It also clearly ignores the principles of military necessity and humanity.

[72] The literature of aerial warfare uses the terms terror attacks, terror bombing, area bombing, morale attacks or morale bombing interchangeably. These terms generally mean that the civilian population is the target where they live, sleep and work in order to lessen their ability and resolve to support continuation of the war.

[73] MCDOUGAL & FELICIANO, *supra* note 16, at 653.

[74] Note, *Aerial Warfare and International Law*, *28* VA. L. REV. 525 (1942).

the enemy population's "will to resist." Incidental civilian losses also cause a failure of the enemy population's will to resist. Therefore targets of military value are not necessary. Simply bomb civilians directly. This is a tortured logic which ignores the principle of humanity.

If the morale attack strategy is to be logically or legally justifiable, it must be shown that indiscriminate bombing of civilians actually causes a loss of the will to resist and induces surrender. Many experts, even those who approved of the practice of bombing civilians, recognized this minimum requirement. One stated: "And this in turn raises the much argued question as to whether ruthless bombardment weakens in time the morale of a belligerent state or merely increases a nation's will to resist. The results in the present war [World War II] would seem to bear out the latter conclusion."[75] A similar view is: "It may be doubted whether attacks of this kind are ever likely to produce any such effects; on the contrary, their very barbarity is rather more likely to intensify the hatred of the people against whom they are directed and drive them to renewed efforts to overcome an adversary who has recourse to such practices."[76]

The evidence we have suggests that attempts to destroy the population's morale by aerial attack are generally not successful. The experience in Germany during World War II provides a good example. Albert Speer, the Nazi minister of munitions (war production), states that Germany was able to increase production all through the bombing raids. The effect on the population was one of "growing toughness." The predominant negative effect on the German war effort was that it tied down men and equipment to defend the cities. However, the aircraft used to bomb German cities could have been used against the same troops if they were located at the front instead of defending cities. Speer does say that a more effective selective campaign against key spots in the German economy, such as the ball bearing industry, would have had a dire effect on war production. However, the Allies only sporadically paid interest to these targets. German leaders were far more concerned about attacks on the ball bearing factories than they were about attacks on the population.[77]

Manchester, in his lengthy history of the Krupp industrial armaments empire, criticizes the British bombing policy as accomplishing little in terms of reducing war production, and notes

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[75] *Id.*
[76] Gamer, *International Regulation of Air Warfare*, 3 AIR L. REV. 113 (1932).
[77] *See* A. SPEER, INSIDE THE THIRD REICH 278 (1970).

that it exhibited wanton cruelty. He argues that the halt in production was eventually caused by a backup of finished arms that the rail system could no longer carry away.[78]

The *United States Strategic Bombing Survey,* a study by several prominent American citizens, was commissioned by the U.S. Government to determine the effect of the bombing efforts in World War 11. The *Survey* generally supports the thesis that the bombing had ambivalent results on the morale of the population. Little effect, if any, on war production can be attributed to a weakening of the populations' morale resulting from bombing practices. However, the bombing of German cities did cause great destruction and loss of life. The results of the *Survey* have largely been ignored by the proponents of air power.[79]

An investigation of other literature on the effectiveness of terror bombing supports the same conclusion.

> [O]ne of the major lessons of World War II experience in military attack upon enemy morale, [is that] such effects may remain wholly confined to the attitude or opinion level and fail of manifestation in the form of overt. politically significant, behavior. . . . The experience of Britain in 1940-41 indicated, some observers believe, that terror bombardment is ambivalent in nature.[80]

Furthermore, there is some evidence that after a certain level of bombing is reached, further intensification of aerial attack may result in the improvement of morale of those under attack.[81]

Terror bombing or morale attack theory presupposes a democratic society or at least a government that is responsive to the will of the people.[82] In Germany, however, the leaders refused any plans for any type of capitulation until the bitter end. Furthermore, if the argument is that the population will force the government to act, it ignores the possibility that the population fears its own government or secret police far more than the dangers of bombing. The secret police may insure a result that is worse and more certain than the relatively indiscriminate bomber for the citizen who challenges the wisdom of national policy.

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[78] *See* W. MANCHESTER. THE ARMS OF KRUPP 470-79 (1964).
[79] 3. U.S. STRATEGIC BOMBING SURVEY; EUROPE, ECONOMIC EFFECTS 2 (1947). *See also* R. LITTAUER & N. UPHOFF, AIR WAR STUDY GROUP: AIR WAR IN INDOCHINA 197 (rev. ed. 1972).
[80] MCDOUGAL & FELICIASO, *supra* note 16, at 655.
[81] *See* U.S. STRATEGIC BOMBING SURVEY: THE EFFECTS OF STRATEGIC BOMBING OK GERMAN MORALE 33 (1947).
[82] *See* Carnahan, *The Law of Air Bombardment In Its Historical Context,* 17A.F.L. REV. 50 (1975).

H. SUPERIOR ORDERS

One of the most startling claims made by those in favor of lesser standards for air crews is that the defense of superior orders should be permitted for airmen even though it is not available to land forces. A former United States Air Force lawyer, H. DeSaussure, in a recent article stated that:

> Certainly the impermissibility of the defense of superior orders has very questionable application to air combat. . . . [T]he airman might properly ask how is he to know, flying off the wing of his flight leader at 30,000 feet, at night, or over a solid covering of clouds, whether the damage his bombs inflict will meet the test of proportionality or his bombing will be indiscriminate. Or if he does exercise his individual judgment on a particular raid, and refrains from the attack by leaving the formation, what proof can he give when a charge is brought by his own authorities for misbehavior before the enemy.[83]

However, the artilleryman might ask a similar question. How is he to know, when ordered to fire a barrage into the fog, whether the shells will cause indiscriminate results? How could he defend himself if he refused the order? Perhaps the aviator is in the easier position because who will know if he deliberately dumps his munitions harmlessly in an unpopulated area? Furthermore, the aviator tends to be more educated, of a higher rank, and less subject to continuous combat stress so he may be more capable of evaluating the legality of an order. Finally, the policy reasons for not allowing the defense of "superior orders" are the same for land or aerial combat.

The military disciplinary code makes failure to obey a lawful order a criminal offense.[84] Clearly this requirement only applies to lawful orders.[85] The individual serviceman must make some determination of the legality of an order whether the subject of the order concerns combat operations or ordinary discipline. Perhaps this is an onerous burden to place on the individual soldier in some situations, but it is absolutely necessary.[86]

If the defense of superior orders can exculpate an individual from responsibility for illegal conduct, the internal discipline of the military force is endangered. Such a situation would remove all

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[83] DeSaussure, ***supra*** note 15, at 544.
[84] UCMJ art. 92(2).
[85] ***See, e.g.***, United States v. Calley, 46 C.M.R. 1131, 1183-84 (ACMR 1973).
[86] This dilemma is not unique to the military. A civilian may be required to act or to refrain from action on the basis of his view of the lawfulness of the act. His ignorance of the true state of the law will generally not relieve him of responsibility. ***See*** Greene, ***Superior Orders and the Reasonable Man,*** CAN. **Y.B.** INT'L L. 61 (1970); Wilner, ***Superior Orders As a Defense to Violations of International Law,*** 26 MD. L. REV. 127 (1966).

moral responsibility from the individual actor once the order is issued and would allow any intermediate level commander to insulate his subordinates against liability for the most outrageous conduct. This conduct could be directed toward the enemy soldier, prisoners of war, civilians, and even against members of his own forces.

> . . . [I]n both civil and military courts, whether in time of peace or armed conflict, it is clear that, while [superior orders] may constitute ground for mitigating punishment, these orders cannot be accepted as justifying an illegal act—at least where the act ordered is of such a character that the order is palpably unlawful.[87]

There is no reason why this view should be less applicable to aerial war crimes.

I. PROOF OF AIR CRIMES

Some of the arguments for less restrictive rules for air combat rest on the idea that it is very difficult for the objects of an illegal attack to discern exactly what airman was responsible for the bomb or missile that struck the illegal target and also whether the damage was accidental or intentional. However, problems of proof exist with all crimes. In some ways the difficulty of proving aerial war crimes may be greater, but it is a matter of degree.

The raid on Dresden, which occurred in the late stages of World War II in Europe, provides a vehicle for examining some of the practical problems with prosecuting personnel associated with air attacks that may be war crimes. A description of the raid which appears in an anthology of short stories about the personal experiences of members of Britain's Bomber Command is the basis for this discussion.88 For purposes of discussing the war crime problems, it will be assumed that the raid was illegal. The raid itself involved almost the entire bomber force of Great Britain. Some of the air units knew the nature of the target beforehand; some did not realize that Dresden was undefended until they reached the target and some never knew. Even in Great Britain there had been substantial criticism of British bombing policies prior to the raid; and the raid itself has been criticized by many scholars of the law of air warfare as being a clear violation of the law of war. Taylor writes: "It is difficult to contest the judgment that Dresden . . . [was a] war crime, tolerable in retrospect only because [its] malignancy pales in comparison to Dachau, Auschwitz and Treblinka."[89]

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[87] Greene, *Superior Orders and the Reasonable Man*, CAN Y.B. INT'L L. 61, 103 (1970).
[88] THE WAR IN THE AIR THE ROYAL AIR FORCE IN WORLD WAR II 417-26 (1970).
[89] T. TAYLOR, NUREMBURG AND VIETNAM AN AMERICAN TRAGEDY 143 (1970).

There is little doubt that anyone would seriously dispute the assertion that the primary objective of the Dresden raid was to kill civilians for the purpose of discouraging the German population from continuing the war. The German armed forces were in a state of collapse by the time the raid took place. The widespread devastation in Dresden included some damage to legitimate military targets such as the city's railway facilities; however, the military value of these targets was small. The destruction of the transportation facilities primarily interfered with the flight of refugees from the advancing Russian troops. If the raid was also intended to pressure the leadership of Germany to end the war, it was a notable failure. Hitler committed suicide only when the Russians approached his Berlin command post.

Assuming that a proper tribunal with jurisdiction over all of the appropriate individuals was convened for the purpose of punishing those guilty of war crimes connected with the Dresden raid, who should stand in the dock? This is not an easy question to answer. Thousands of airmen were involved. Of course, all were ordered to participate. Should culpability vary among crew members? Does the pilot share equal guilt with the navigator; the bombardier? What of the tail gunner whose mission is to provide defense against enemy fighters? What about crews of escort aircraft whose duties involve activities other than dropping bombs? Should ground maintenance crews share blame? Their participation is just as necessary for the mission as that of the air crew. What about the intelligence officers who briefed the air crews before the mission? They probably knew more than most crew members about the nature of the target. How should crews that intentionally dropped their bombs wide of the target be treated? Would it make a difference if they dropped their bombs wide accidentally? How would knowledge of the nature of the target be proved?

Obviously there are serious practical problems in assessing culpability and prosecuting those who carried out the raid. The culpability of those who planned and approved the raid would be a much easier task to prove; however, these individuals occupied high positions in the British government making it less likely that the war crime issue would be pursued. The fact that a very large number of people were involved in the execution of the raid would also make treatment of the incident as a war crime less likely.

Consider a few of the prosecution problems present in the preceding situation:

a. It is difficult to connect particular acts of violence with specific individuals because of the large scale destruction in a large air attack;

b. The delivery of an attack requires the cooperation and support of many persons with combat and noncombat skills;

c. Frequently only the crewmember knows what actually happened on a raid. Finding witnesses to specific acts is difficult.

Certainly, a raid the size of that sent against Dresden is unusual. The problems in prosecuting aerial war crimes are, however, similar to those that might occur when prosecuting land warfare crimes. Many people may be involved in an illegal artillery bombardment, a helicopter strike or even a missile strike. The problems of proving prior knowledge, of assessing degrees of culpability or of producing witnesses to the events would all be similar to the situation involving air combat. Clearly the problems in this area will not support or justify less restrictive standards for aerial combat.

J. FAILURE TO PROSECUTE

The lack of attention given aerial war crimes by the war crimes tribunals is often treated as tacit agreement with the position that aerial attacks aimed at civilians are legal. For example: "In view of the nonprosecution of any Axis airman or official for his part in air activities, strategic bombing . . . must be judged on different grounds."[90]

This approach is invalid for several reasons. Nonprosecution of specific instances of a particular crime does not in itself invalidate laws prohibiting that conduct. All legal systems assume the willingness of those charged with the duty of prosecuting to prosecute. The will to prosecute is sometimes lacking in both the municipal and international legal systems.[91]

In World War II the terror attack strategy was used by at least three major nations: Great Britain, Germany and, later in the war, the United States. It is probable that air war crimes were not charged because of the lack of "clean hands" by two of the victorious states. The unwillingness of two states to engage in public debate about the wisdom of certain policies hardly provides strong evidence of the customary law of aerial warfare.

K. LACK OF RULES

It is sometimes asserted that there are no rules in treaties that

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[90] DeSaussure, *supra* note 15, at 544.

[91] "What the dualists overlook is the fact that while departures from international law are occasionally successful in fact, this merely indicates that lawlessness, in the particular instance, has prevailed. . . ." Borchard, ***The*** *Relation Between International Law and Municipal Law*, ***27*** VA. L. REV. 140 (1940).

will regulate aerial attack.[92] There is, however, one treaty which specifically regulates bombardment:

> Article 25 of Hague Convention IV, regarding the bombardment of places on land, was carefully fashioned to read: "The attack or bombardment, by any means whatsoever, of undefended towns, villages, dwellings, or buildings is forbidden." The words "by any means whatsoever" were deliberately inserted in this sentence, after considerable discussion, with the specific intention of making air attacks illegal.[93]

This treaty was drafted in 1907 before many thought aircraft were of much military use. Those who deny its applicability to modern air attack do so on various grounds.

Article 25, it is claimed, does not apply to air forces because towns or cities would never submit to the orders of the air commander who could not physically enforce his demands. In support of this view, Colonel L. Jackson wrote in the London *Times* on April 23, 1914:

> When is a town "not defended"? ...I presume when it submits without any opposition to the authority of the enemy....I will put an extreme case. The commander of an enemy's war balloon might arrive over London if unopposed, and signal as a matter of courtesy, "I am going to drop explosives." We answer, "You cannot drop explosives, we are not defended." The commander replies, as it seems to me quite logically "Then you surrender. Good. You will now obey orders."[94]

Similarly, Colby states, that "If a town contain any military stores or headquarters or factories at all, it will also contain a certain number of military persons, even though they be 'unfit for active duty' or 'Home Guard' units."[95] The town may have anti-aircraft guns or aircraft to defend itself. The simplistic conclusion reached by Colby and others is that towns and cities are never truly undefended against air forces; therefore, the prohibition in Article 25 is never applicable in practice.

Another and distinct reason is often given for the nonapplicability of Article 25 to aerial warfare. This argument concludes that undefended towns were immune from bombardment by land forces because they were free to be occupied by the ground force. Air forces could not occupy an undefended town so the rule cannot apply to them.

Those writers who conclude that Article 25 is not applicable to aerial warfare or specifically to aerial bombardment hold that because there is no other treaty regulating aerial warfare, aerial bombardment is legally unrestricted. However each of the

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[92] DeSaussure, *supra* note 15, at 531.
[93] Colby, *Aerial War and War Targets*, 19 AM. J. INT'L L. 703 (1925).
[94] *Quoted id.* at 707.
[95] *Id.*

arguments which opposes the applicability of Article 25 fails to withstand logical analysis.

The air power advocates mistake the import of Article 25. The provision was written at a time when some cities were built as fortresses. Bombardment of a defended town was concerned with an operation which involved shelling the entire town, for example, in a siege. A city which was defended in this manner could become undefended by voluntary submission to the enemy. However, the quality of being "defended" cannot depend on whether there is total submission of all inhabitants. If this were the case, the rule would be useless for both land and air forces.

The key to whether a city is defended or undefended is whether the city as a whole is operated or used as a military strong point or fortification. If the city is undefended, general bombardment would amount to the kind of destruction without legitimate military purpose which violates the principles of military necessity and proportionality.

This does not preclude discriminate bombardment of legitimate military targets located in towns which are otherwise undefended. Where there is a legitimate military purpose, bombardment is allowed:

> Factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies. ports and railroads being used for the transportation of military supplies, and other places devoted to the support of military operations or the accommodation of troops may also be attacked and bombarded even though they are not defended.[96]

Furthermore, it is not true that ground forces are in a different position from air forces with respect to occupying a town. Ground forces can bombard towns by long range artillery or missiles, but may not be able or desire to capture and occupy the town under bombardment. Because there are no compelling differences in the application of the prohibitions of Article 25 to land and air forces, and Article 25 clearly applies to land forces, it should logically apply to air forces.

L. 1923 DRAFT RULES

Another issue which must be considered in any discussion of the relationship between the law of land and aerial warfare is the effect of the draft Hague Rules of Air Warfare.[97] This document was

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[96] FM 27-10, *supra* note 5, at 19.

[97] The complete text of The Hague Rules of Air Warfare can be found in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 437 (1972).

written in 1923, but was never adopted by the states whose air forces it was intended to regulate, This, coupled with the fact that some of the draft rules were violated by both sides in World War 11, has led some writers to conclude that the draft rules comprise a code that goes beyond what was then required by the customary law of war. Perhaps that is true. However, it is not necessary to take the further step and hold that the failure to adopt the draft is equivalent to approval of conduct prohibited in the draft. Unfortunately there has been a tendency for writers to emphasize only the failure to adopt the rules; they fail to consider that the conduct may be prohibited on other grounds.

The draft rules were thought to be a formulation of the customary law of the time. It is probably fair to say that except for special rules like Article XXVI, the rules have been observed more often than they have been violated. Some of the rules, including Articles I through XXI have been almost universally recognized and observed. Therefore it is inaccurate to say that the "rules" have been ignored. It is better to say that the draft Rules of Air Warfare are merely evidence of what the law of aerial warfare is. To the extent the draft rules exceed the standards embodied in the general principles of the law of land warfare, they are weak evidence of the customary law.

M. CUSTOMARY PRACTICE

There remains the question of whether the practice of states has established a customary rule of warfare that recognizes less restrictive standards for aerial combat. Many writers assume this to be so. For example, Spaight in 1947 wrote: "One of the practices of the war [World War II] which must be regarded now as established usage is that of the bombardment of ***target areas*** rather than of specific military objectives therein."[98]

What is the evidence on this point? It is clear that no state during World War I attempted to justify its bombing practices on the grounds that civilians were a legitimate target. The states involved claimed that cases of bombing civilian areas were honest mistakes. In any case, the total effect of bombing by aircraft in World War I was small.

In World War II the Allies defined the object of the air war against Germany as: "[T]he progressive destruction and dislocation of the German military, industrial, and economic system, and the undermining of the morale of the German people to a point

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[98] J. SPAIGHT, AIR POWER AND WAR RIGHTS 254 (1947).

where their capacity for armed resistance is fatally weakened."[99]

It is unclear from the definition whether the undermining of morale was to be merely a consequence of bombing legitimate targets or whether the German people were to be a target of the bombing. It is clear that during some periods, England's Royal Air Force Bomber Command's central strategy was the use of area raids. While the United States Army Air Corps devoted itself mainly to daylight precision bombing attacks, the RAF flew mainly at night. The division of duties was partly because of limited air space and a shortage of air field facilities in Great Britain, but also because the British felt daylight raids were too costly in terms of lost men and aircraft.

Area raids were said to have the following characteristics: "[T]hey were made generally at night; they were designed to spread destruction over a large area rather than to knock out any specific plant or installation; and they were intended primarily to destroy morale, particularly that of the industrial worker."[100] Only 24 percent of the bombing effort in Europe by the Allies was devoted to such raids.[101]

Did the practice in World War II with respect to aerial warfare establish a new rule of customary law?[102] The answer is clearly no. In Europe, only England and Germany claimed the right to attack civilians directly. However, it is significant that they did not claim this right under any rule or principle of international law that would permit the targeting of civilians. Early in the air battle over England, an area of central London was attacked by German bombers. After the war it was found that this raid was an accident.[103] However, on the very next night a British bomber force

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[99] CRAVEN & CRATE, THE ARMY AIR FORCES IN WORLD WAR II 305 (1949).
[100] MCDOUGAL & FELICIANO, *supra* note 16, at 654.
[101] U.S. STRATEGIC BOMBING SURVEY: OVER-ALL REPORT (EUROPEAN WAR) 2 (1945).
[102] Two typical descriptions of international custom are:

> The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law and the failure of other States to challenge that conception at the time.

M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-42, at 609 (1943);

> The practice of States, evidenced by the pronouncements of executive, diplomatic, and at times judicial agencies, is the basis of the customary international law. Before it can be said to establish a rule or principle of international law, a practice must be concordant and general, and it must be to some extent continuous. The practice of one State or the practice of several States, even though continuous, may not result in establishing rules and principles of international law.

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE INTERNATIONAL LAW OF THE FUTURE: POSTULATES, PRINCIPLES AND PROPOSALS 26 (1944).
[103] COLLIER, THE DEFENCE OF THE UNITED KINGDOM 233 (1957).

was sent against Berlin as a reprisal for the London raid, although the British bombers were instructed to strike specific industrial targets.[104] As was usually the case, many bombs missed their targets and destroyed civilian areas instead. A few days later the Germans began unrestricted bombing of English cities in reprisal for the Berlin raid.[105]

Nevertheless, even much later in the war both the British and the Germans were still claiming that their bombs were aimed only at military objectives.[106] After the war was over some of the participants claimed that bombing policy during the war was permissible because there was a lack of law controlling aerial warfare.[107] This claim falls far short of asserting a right to act under a rule of international law that permitted their forces to attack civilians directly in order to weaken their morale.[108]

The United States, for the most part, conducted daylight precision raids in Europe. Later, American forces did conduct area raids against Japanese cities. This was done under the theory that the Japanese war industry was widely dispersed in several large cities. Therefore, in effect, the United States claimed that the real target was the war industry.[109]

In any case, the two principal states that engaged in area raids, Great Britain and the United States, never claimed a right to attack civilians under international law. Even if they had done so, the practice of a few states will not necessarily establish a rule of customary law.[110]

N. JUDICIAL OPINION

There are only a few judicial decisions that discuss the legality of tactics employed in air warfare. The Greco-German Mixed Arbitral Tribunal cases after the first World War and a Japanese case after World War II clearly hold that bombing attacks aimed at civilians

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[104] J. SPAIGHT, AIR POWER AND WAR RIGHTS 268 (1947).
[105] *Id.*
[106] *Id.* at 267. It should be pointed out that the British relied on an area bombing strategy much more than the Germans. "In Coventry, 100 out of 1,922 acres had been destroyed. But in Hamburg, 6,200 out of 8,382 acres were destroyed; in Essen 1,030 out of 2,630." *See* Comment, *The Protection of Civilians From Bombardment by Aircraft: The Ineffectiveness of the International Law of War*, 33 MIL. L. REV. 93, 102, 105 (1966).
[107] A. HARRIS, BOMBER OFFENSIVE 177 (1947).
[108] *See generally* Comment, *The Protection of Civilians From Bombardment by Aircraft: The Zneffectiveness of the International Law of War*, 33 MIL. L. REV. 93, 102 (1966).
[109] *Id.*
[110] *See* note 102 *supra*.

are illegal under international law. The War Crimes Tribunal in Germany after World War II mentioned aerial warfare but was neutral with respect to the question of whether the laws of air and land combat are different.

In *Brothers v. Germany,* a 1927 case, the Tribunal ruled on a claim that involved the destruction of a supply of coffee by a German air raid in 1916 on Salonica. The Tribunal found that Germany was entitled to take military action in Salonica, but that did not excuse any violations of the law of warfare. The attack was made by a zeppelin which dropped its bombs at night, without warning, from the height of 10,000 feet.

> The Tribunal recalled that "it is one of the principles generally recognized by international law that the belligerents must respect, as far as possible, the civilian population and their property," and fortified itself by Article 26 of the Hague Regulations of Land Warfare of 1907. While, in Article 25, the words "by whatever means" were expressly inserted to include air attacks on undefended towns, the Tribunal held that Article 26 envisaged only measures of land warfare. The ratio *legis,* however, was that the previous warning would afford the authorities of the menaced town the opportunity either of avoiding the bombardment by the surrender of the town or of evacuating the civilian population. As the Article "must be considered as expressing communis opinio on the subject-matter," and as "there is no reason why the rules adopted for bombardment in war on land should not equally apply to aerial attacks," the Tribunal arrived at the conclusion that "the bombardment must be considered as contrary to international law."
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> The Tribunal dealt curtly with the argument that the peculiarities of bombardment from the air, and its different purpose — destruction as contrasted with occupation — excluded announcement in advance, necessarily required the element of surprise, and, therefore, made Article 26 inapplicable: "Even if this allegation of the defendant were true from a military point of view, it would not follow that bombardment by air without warning is lawful, but, on the contrary, it would lead to the conclusion that these bombardments are generally inadmissible."[111]

A second case, *Kiriadolou v. Germany* (1930), involved the death of the claimant's husband during an air raid on Bucharest by Germany in 1916. The Tribunal came to similar conclusions.[112]

During the trials of the war criminals after World War 11, the legality of air attacks on civilians was raised only indirectly. In the *Einsatz-Gruppen* case,, the defendants claimed that their actions could not possibly be considered any more culpable than the Allied air raids which caused numerous civilian deaths. The court denied the defendants the opportunity to rely on this defense. The court's opinion is often cited as a judicial sanction of less restrictive standards for aerial warfare.

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[111] Schwarzenberger, *The Lau of Air Warfare* and *the* Trend *Touards Total War.* 8 AM. U.L. REV. 3 (1959).
[112] Id. at 6.

> A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, factories razed, all for the purpose of impeding the military. It inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. ***The*** *civilians* ***are*** *not individualized.* The pilots take their aim at the railroad yards, houses along the tracks are hit and many of the occupants are killed, but this is entirely different in law and in fact from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children, and shooting them.[113]

There are two important points to be gleaned from this language. First, none of the defendants had been charged with aerial war crimes. The court's statement was dictum. Second, and more importantly, a careful reading of the court's statement will not support the claim that this opinion stands for the proposition that aerial warfare and land warfare are subject to different standards. It is merely a statement that the law is different with respect to incidental damage from bombing and the intentional, direct act of pulling civilians from their houses and shooting them.

The Japanese case, *Ryuichi Shimoda et al. v. the State* involved a civil damage suit for injuries resulting from the United States use of atomic bombs in Japan. In the trial which was held in Tokyo in 1963, the plaintiffs alleged "that the dropping of atomic bombs as an act of hostilities was illegal under the rules of positive international law (taking both treaty law and customary law into consideration) then in force, for which the plaintiffs had a claim for damages."[114]

In the relevant part of the opinion the court said that "the aerial bombardment with atomic bombs of the cities of Hiroshima and Nagasaki was an illegal act of hostilities according to the rules of international law. It must be regarded as indiscriminate aerial bombardment of undefended cities, even if it was directed at military objectives only inasmuch as it resulted in damage comparable to that caused by indiscriminate bombardment."[115] The plaintiffs were denied relief on other grounds.

The decision gives exhaustive consideration to the law of aerial warfare in its opinion. For purposes of this article, the key portion of the court's opinion is its statement that indiscriminate aerial bombardment is illegal. In this court's view aerial and land warfare are subject to the same restrictions under the customary law of war.

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[113] Einstaz-Gruppen Case, 4 Trials of the War Criminals 447-67 (1949).
[114] ***See*** **2** THE **LAW** OF WAR: A DOCUMENTARY **HISTORY** 1688 (1972).
[115] *Id.* at 1689.

IV. CONCLUSION

The confusion about whether there is or should be a separate body of rules for aerial combat is related to a more fundamental problem. There is a lack of careful analysis regarding the relationship of land forces and air forces in combat. Terms such as land power and air power are frequently used with little thought given to what specific meaning is intended.

A substantial portion of the dialogue in this area is conducted without thought of its ramifications on the rules of war; it is simply a manifestation of bureaucratic efforts to obtain budget allocations. Much of the debate involves the relative importance of various elements of the total force. However, when insuring preparedness for a general war where air, land and naval forces are necessary, arguing that one is more important than another is similar to arguing about which span of a bridge is the most important.

A. INFLUENCE OF AIR POWER ADVOCATES

Many of the commentators on the law of aerial warfare have been primarily advocates of "air power." Spaight, the author of several books on air power[116] and numerous articles in legal journals, is a prime example. He is widely quoted today as being "strong authority."[117] Many air power advocates look to his works as authoritative sources. Nevertheless, if one closely examines any of his works, many of his ideas are shown to be clearly erroneous by subsequent experience, for example, his theories of the unlimited potential of air power and his theories which were later used to justify indiscriminate bombing of cities.

B. A NUCLEAR DAMPER

Since the end of World War 11, many writers on aerial combat have focused on the problems of nuclear war. During the last thirty years the very existence of nuclear weapons has tended to reduce concerns about the proper limits of violent forces in war. The public is aware of the incredible devastation that would occur if nuclear weapons were once again used on the world's cities. The public is also aware that targeting of nuclear-armed missiles on most cities is an integral part of the strategy that has resulted in a nuclear

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[116] ***See*** notes 56 & 98 *supra*.
[117] ***See,*** *e.g.*, DeSaussure, *supra* note 15.

stalemate among the major powers. It seems anomalous, therefore, to continue to be concerned about pilots in fighters or helicopters making legal distinctions between targets in urban areas. However, nuclear devastation would destroy all existing legal systems, international and municipal, criminal and civil. The law of war is not unique in that regard, nor is the law of aerial warfare. Few people would argue that the municipal criminal law should be abandoned because nuclear devastation may be the world's future. Similarly, the possibility of nuclear war is not sufficient justification for failure to regulate interstate conflict that falls short of total destruction.

Assuming the survival of civilization, it is obviously in the interest of our armed forces to observe the ancient principles of war, including economy of force, conservation of resources and sound target intelligence. The law of war is fully consistent with these principles.

C. SUBJECTIVE VERSUS OBJECTIVE

To those who argue that subjective concepts embodied in the existing law of land warfare are not practical enough for the pilot of an aircraft who must make quick decisions, the answer is that:

> A functional legal approach to targeting probably can be spelled out only in terms of military necessity and proportionality. Lawyers and triers of fact who have long dealt with such terms as "reasonable," who have long balanced conflicting concepts, should not be bothered by judgments based on rules, the applicability of which can only be determined in a given factual setting. Failure to think in this way has too often caused failure of the rules of warfare.[118]

D. RECENT STATEMENTS

The most recent general statement by the international community on the law of war is fully consistent with the prior law. In 1968 the United Nations General Assembly adopted Resolution **2444.** This resolution, which was taken from a resolution adopted by the International Red Cross Conference of 1965, stated in relevant part:

> 1. The right of the parties to a conflict to adopt means of injuring the enemy is not unlimited.
> 2. It is prohibited to launch attacks against the civilian populations as such.
> *3.* Distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.[119]

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[118] Adler, Targets *in War:* Legal Considerations, 8 HOUSTON L. REV. 27 (1970).
[119] **G.A.** Res. 2444, 23 U.N. GAOR Supp. 18, at U.N. Doc. A/7218 (1969). See *also* S. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR 93 (1972).

This statement makes no distinction on the basis of whether the attack is launched from ground or aerial platforms.

Examination of the texts adopted by the main committees of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflict during the first (1974) and second (1975) sessions reveals many limitations and prohibitions applicable to attacks. The text also includes detailed procedures designed to avoid unnecessary destruction. Nowhere does this document state explicitly or implicitly that attacks from aerial platforms are regulated by less restrictive standards.[120]

E. ***SUMMARY***

In summary:

a. There are no compelling theoretical or practical reasons for admitting different legal standards for aerial warfare.[121]
b. There is no judicial precedent that would justify a different legal standard for aerial warfare.
c. There is no general practice among nations that could be said to be the basis of a customary international rule that establishes less restrictive standards for aerial warfare.
d. There is an existing structure of customary and treaty law which provides an adequate basis for the regulation of aerial combat.

A 1975 publication of the Department of Defense intended to be a guide to all officers of the United States Armed Forces states:

> The United States abides by the laws of war. Its Armed Forces, in their dealings with all other peoples, are expected to comply with the laws of war in the spirit and to the letter. In waging war, we do not terrorize helpless noncombatants if it is within our power to avoid so doing. Wanton killing, torture, cruelty, or the working of unusual and unnecessary hardship on enemy prisoners or populations is not justified in any circumstance. . . .Pillaging, looting, and other excesses are as immoral when Americans are operating under military law as when they are living together under the civil code. . . .The main safeguard against lawlessness and hooliganism in any armed body is the integrity of its officers. When men know that their commander is absolutely opposed to such excesses and will take forceful action to repress any breach of discipline, they will conform. But when an officer winks at any depredation by his men, it is no

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[120] Draft Additional Protocols, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict. Text adopted by main committees of the Conference, Geneva (19753.

[121] *See* Carnahan, *The Law of Air Bombardment In Its Historical Context*. 17A.F.L. REV. 39 (1975).

different than if he had committed the act.[122]

This statement represents sound doctrine; however, it assumes a clear understanding of what the law is. Although Field Manual 27-10 poses no theoretical or practical problem with respect to its application to the regulation of U.S. Army aviation forces, it is not clear from the text of the Manual that it does so apply. Consequently, the Manual should be revised to affirm unequivocally that the basic principles underlying the law of war are the same, regardless of the form of warfare being pursued.

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[122] U.S. DEP'T OF DEFENSE, THE ARMED FORCES OFFICER 191 (1975). Similar language has been included in earlier versions of this publication.

THE PROPER ROLE OF THE MILITARY LEGAL ASSISTANCE OFFICER IN THE RENDITION OF ESTATE PLANNING SERVICES*

Mack Borgen**

I. INTRODUCTION

In the past several years numerous books, articles, government publications and military regulations have considered the estate and tax planning issues which commonly confront military members and their families' and have addressed the specific military or military-related emoluments which have estate and tax

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*The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] Government attorneys have been instrumental in the preparation of most of these materials. Among the texts, ***see*** THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, STUDENT TEXT, SELECTED READINGS ON ESTATE PLANNING (1976); M. KINEVAN, PERSONAL ESTATE PLANNING—A PRIMER ON ESTATE ACCUMULATION TECHNIQUES AND DISPOSITIVE ARRANGEMENTS (11th ed. 1975) (written by Colonel Marcos E. Kinevan, USAF, this book focuses on the extremely broad subject of personal estate planning for the service member and his family); U.S. DEP'T OF ARMY, PAMPHLET NO. 27-12, LEGAL ASSISTANCE, pt. 7 (1974) [hereinafter cited as LEGAL ASSISTANCE HANDBOOK]. While some articles on this topic have been published, ***see, e.g.***, Dorrough, ***The Death of an Estate,*** 17 A.F.L. REV. 108 (1975); Siefert, ***Death Taxes and Estate Planning,*** 18 JAG J. 207 (1964), a number of theses presented by members of The Judge Advocate General's School's Officer Advanced Course dealing with these topics, ***see*** Berkley, Tax-Planning and the Middle-Income Military Investor (1973); Gullage, Estate Planning for the Military (1966); Newman, Death Taxes—You Do Have a Choice (1974), have not been published. In addition, theses written in satisfaction of the writing requirements for the Nonresident Judge Advocate Officer Advanced Course, which are far shorter in length and narrower in scope than the resident Advanced Course theses, are available. *Cf.* Duffey, The Uniform Probate Code as it Affects the Serviceman (1976). This thesis is rather misleadingly titled; it summarizes certain provisions of the Uniform Probate Code as they would relate to small and moderate-sized probate estates. All of these theses are on reserve in the Library of The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901. For a further description and a complete listing of all Nonresident Advanced (Correspondence) Course Theses [hereinafter cited as JA Reserve Theses] relevant to the practice of military legal assistance and other estate planning information, ***see*** Borgen, ***Legal Assistance Items,*** THE ARMY LAWYER, July 1975, at 35-36 (JA Reserve Theses listed); ***id.,*** Aug. 1975, at 37 (Survivor's Benefits-Dependency and Indemnity Compensation—Veteran's Disability Compensation); ***id.,*** Sept. 1975, at 40-41 (JA Reserve Theses listed); ***id.,*** Dec. 1975, at 34 (Wills-Drafting of Living Wills).

planning significance.[2] Despite this considerable proliferation of materials, one subject of major importance has been ignored. That subject is the potential and proper role of the military Legal

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[2] The following list of references, categorized by general subject, is not meant to be exhaustive. The materials are listed because of their comprehensiveness and quality or because of their probable availability to and frequent use by military Legal Assistance Officers. For general reference, *see* U.S. DEPT OF ARMY, PAMPHLET NOS. 608-2, YOUR PERSONAL AFFAIRS (1972); 608-4, FOR YOUR GUIDANCE—A GUIDE TO THE SURVIVORS OF DECEASED ARMY MEMBERS (1975). The Army Times Publishing Co. periodically publishes useful summary sheets on selected estate planning topics or military emoluments. A subject and price list may be obtained by writing the Army Times Service Center, 475 School Street, S.W., Washington, D.C. 20024. Questions concerning government and commercial life insurance may frequently be answered by reference to Army Reg. No. 608-2 (10 Oct. 1973) (Record of Emergency Data and Servicemen's Group Life Insurance); Army Reg. No. 608-5 (31 June 1971) (U.S. Government Life Insurance (USGLI) and National Service Life Insurance (NSLI)); U.S. DEP'T OF ARMY, PAMPHLET NO. 360-517, ARMED FORCES LIFE INSURANCE COUNSELOR'S GUIDE (1975); VETERANS' ADMINISTRATION HANDBOOK 29-75-1, SERVICEMEN'S GROUP LIFE INSURANCE AND VETERANS' GROUP LIFE INSURANCE (1975) (This VA publication is a well-written and comprehensive 56-page handbook which explains in detail the entitlement to and procedures relevant to these two government insurance programs. Copies of all SGLI and VGLI forms are included as appendices. Individual copies may be obtained by writing the Office of Servicemen's Group Life Insurance, 212 Washington Street, Newark, N.J. 07102.). The Department of Defense Office of Information prepares DoD Information Guidance Series publications [hereinafter cited as DIGS] which occasionally relate to military emoluments and the estate planning aspects of such benefits. *See* DIGS NOS. 8A-13, *Life Insurance and the Service Family—Service Families* (1975); **8A-14,** *Life Insurance* (1975); 8A-15, *Estimating Survivor Income* (1975). If copies of the publications are not immediately available, the Legal Assistance Officer may obtain a limited number of copies upon request from DIGS, Room 506, Department of Defense, 1117 North 19th Street, Arlington, Virginia 22209. *See also* Freeman, *Life Insurance and Estate Taxes*, 16 A.F.L. REV. 1 (1975); Lacy, *Life Insurance As A Function of Estate Planning for the Middle-Income Military Member*, 17 A.F.L. REV. 1 (1975). Unpublished JA Reserve Theses on this topic include Latt, The Legal Assistance Area Dealing With Various Aspects of Life Insurance and Jointly Owned Property in Estate Planning (1974); and Pajak, The Effect of War and Military Service Exclusions on the Payment of Benefits Under Life Insurance Policies (1975).

The basic statutory and regulatory authorities for the Retired Serviceman's Family Protection Plan are 10 U.S.C. §§ 1431-1446 (1970); Army Reg. No. 608-30 (3 Apr. 1969). *See also* Clinebell, *Dependents of Public Pensioners: The Forgotten Spouse*, 9 CLEARINGHOUSE REV. 694 (1976); Miller, *The Federal Taxation of Benefits Under the RSFPP*, 20 JAG J. 37 (1966); Note, *Federal and State Tax Information on SBP [Survivor Benefit Plan]/RSFPP Annuities*, THE RETIRED OFFICER, May 1976, at 43.

Social security and programs sponsored by the Veterans' Administration provide significant benefits for service families. Although veterans are not eligible for military legal assistance, Army Reg. No. 608-50, para. 6 (22 Feb. 1974), the Legal Assistance Officer is called upon to discuss this subject when counseling active duty members and their dependents. Some of the more significant articles in this field include Burner, *Veteran's Benefits and Estate Planning*, 57 ILL. B.J. 227 (1968); Caffell, *Social Security Retirement Benefits for Military Personnel*, 12 JAG L. REV. 171 (1970); Note, *Federal Death Benefits*, 5 REAL PROP., PROB. & TR. J. 248 (1970). Other materials include *Estimating Social Security Retirement Benefits (For Servicemen and Veterans)*, DIGS NO. **8A-42** (Rev. 1, 1976); *Social Security and Service Families*, DIGS NO. **8A-2** (Rev. 3, 1975); VETERANS' ADMINISTRATION. FACT SHEET NO. 1S-1, FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS (1976). The comprehensive

Assistance Officer in the rendition of estate planning services to members of the military community.

It is the purpose of this article to evaluate the role of the Army Legal Assistance Officer (LAO) as an estate planning attorney.[3] Unquestionably, the types of legal services which may be provided pursuant to the Army Legal Assistance Program are far reaching. The scope of those legal services is limited only by certain express prohibitions in the governing regulation or other directives[4] and by

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57-page publication is available from the regional offices of the Veteran's Administration or from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20420, at a cost of 95¢ per copy.

For information concerning the survivor benefit plan, ***see*** 10 U.S.C. §§1447-1455 (Supp. V, 1975); Dep't of Defense Directive No. 1332.27(4 Jan. 1974); Army Reg. No. 608-9 (23 Mar. 1975). ***See also*** Clinebell, ***Dependents of Public Pensioners: The Forgotten Spouse,*** 9 CLEARINGHOUSE REV. 694 (1976); Durrough, ***Survivor Benefit Plan (SBP)—The $200,000 Retirement Benefit,*** 17 A.F.L. REV. 59 (1975); Lien & Hayman, ***The Survivor Benefit Plan: A New Element in Estate Planning,*** THE RETIRED OFFICER, Nov. 1972, at 31; Loughry, ***SBP—Some Winners and Some Losers,*** MARINE CORPS GAZETTE, Aug. 1974, at 32; Mangas, ***Look Twice Before You Decide on the New Survivor Benefit Plan,*** ARMED FORCES J. INT'L, July 1973, at 37; ***The Survivor Benefit Plan,*** DIGS NO. 8A-27 (1974); Baldwin, The Survivor Benefit Plan—When Selecting An Annuity May Be Wise (1975) (JA Reserve Thesis).

Other regulatory provisions of interest to the LAO include Army Reg. No. 600-10 (15 Jan. 1976) (Army Casualty System); Army Reg. Nos. 638-1 through 638-422 (Disposition of Personal Effects of Deceased Personnel, Graves Registration, Care and Disposition of Remains); U.S. DEP'T OF ARMY, PAMPHLETS NOS. 600-5, HANDBOOK ON RETIREMENT SERVICES—FOR ARMY PERSONNEL AND THEIR FAMILIES (1975) 608-33, SURVIVOR ASSISTANCE OFFICER AND FAMILY SERVICES AND ASSISTANCE OFFICER HANDBOOK (1971); 608-34, HANDBOOK FOR NEXT OF KIN OF ARMY PRISONERS OF WAR/MISSING PERSONNEL (1972). ***See*** Hayman, ***Military Service Credit Toward Civil Service Retirement,*** THE RETIRED OFFICER, Oct. 1973, at 28, ***reprinted, id.,*** Oct. 1975, at 2 2 Stewart, ***Legal Problems*** of ***the Returned Prisoners*** of ***War and of the Families of Those Still Missing in Action,*** 6 U.W.L.A.L. REV. 22 (1974); Stewart, ***The Plight of the POW/MIA and Attendant Legal Problems,*** 8 CREIGHTON L. REV. 295 (1974-1975) (although apparently written in 1973 and limited in many respects, the article does outline many of the serious legal problems common to POW/MIA families including powers of attorney, conveyancing and conservatorships, presumptive findings of fact, pay and allowances of men in a missing status and some of the state and congressional legislation designed to facilitate the resolution of these legal problems); Wellen, ***Armed Forces Disability Benefits—A Lawyer's View,*** 27 JAG J. 485 (1974) (an excellent article with succinct descriptions, and sound analysis of the benefits available); Crow, Emoluments of Military Service as Community Property (TJAGSA Officer Advanced Course Thesis, 1974).

[3] The scope of this paper is limited to the role of the Army Judge Advocate serving in the capacity of a Legal Assistance Officer pursuant to the program authorized by Army Reg. No. 608-50 (22 Feb. 1974) [hereinafter cited as *AR* 608-50]. There are minor differences between this legal assistance program and the parallel programs of the other services, but it is the opinion of this writer that the thesis of this article and the considerations discussed herein are equally applicable in most instances to the Legal Assistance Officers of the other services.

[4] It should be noted that unlike many of the other legal responsibilities of the Judge Advocate Legal Service and the Judge Advocate General's Corps there is no statutory basis for the rendition of legal assistance. ***See generally*** Army Reg. No. 27-1 (20 Apr. 1976). The Army Legal Assistance Program is based solely upon military

the practical limitations and ethical constraints existent in any staff office legal assistance program. Although ethical responsibilities must be accepted and although some of the other factors *periodically* may temper or foreclose the possibility of rendering estate planning services, such factors do not eradicate the clients' needs and should not unnecessarily be interposed as reasons for refusing such services.

It is the conclusion of this author that in many instances the military Legal Assistance Officer is not adequately counseling and assisting clients in estate planning matters. This conclusion is based upon the considered analysis of the nature of military clients and their respective estates and upon evaluation, to the extent possible, of the reasons that attorneys either do not or are reluctant to render estate planning services. Even without extensive prior academic training or a developed expertise, without voluminous research materials, and without the freedom to represent clients in court,[5] competent estate planning services can and should be provided by the Legal Assistance Officer under the Army's Legal Assistance Program. Of equal importance, but not in any way in-

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regulation. Army Regulation 608-50 places general responsibility for the program with The Judge Advocate General and further directs

> [e]ach commander empowered to convene general courts-martial, and each installation commander having a Judge Advocate or Department of the Army civilian attorney assigned to his staff [to establish] a legal assistance office when he determines that a need for such activity exists, adequate resources are available, and personal legal services are not readily available from nearby legal assistance offices of the **Army,** Navy, Air Force, Marine Corps. or Coast Guard.

AR 608-50, para. 5*a*. *But* see *id.* at para. 4*d* (court representation programs will be initiated only at the discretion of The Judge Advocate General as resources permit).

On February 28, 1975, Senators McIntyre (D.-N.H.), Taft (R.-Ohio), and Bayh (D.-Ind.) introduced legislation which would provide that "Armed Forces personnel and their dependents are entitled to legal assistance in connection with their personal legal affairs under such regulations as may be prescribed by the Secretary concerned." S. 895, 94th Cong., 2d Sess. § 2 (1975). Noting that without a statutory basis the legal assistance programs had "become a primary target of budget cutters," 121 CONG. REC. S 2825 (S. daily ed. 1975), this proposed legislation is designed to assure the continued and permanent rendition of legal services to service members and their dependents and to assure the continuation of the Expanded Legal Assistance Program for those service members and dependents who could not otherwise afford court representation without "undue hardship." *See* text accompanying notes 32-50 *infra*.

[5] In most instances the Legal Assistance Officer is precluded from representing his client in court. However, in some jurisdictions court representation by JAGC counsel is available to active duty members and their dependents "who are unable to pay legal fees [to members of the civilian bar] for the services involved without substantial hardship to themselves or [their] families." AR 608-50, para. 4*a* (3). The existence of this "expanded" legal assistance program in any jurisdiction is conditional upon, and subject to, the approval of the state bar and judiciary. Court representation is ordinarily limited to civil cases. Letter of The Judge Advocate General, dated 30 December 1974. For a far more detailed discussion of the "expanded" legal assistance program *see* text accompanying notes 32-50 *infra*.

consistent with the first conclusion, the Legal Assistance Officer must perceive and accept the more limited responsibility of identifying those clients who should consult an estate planning specialist, and he should vigorously recommend that such individuals retain civilian counsel.

A great majority of clients who are eligible for legal services under the military legal assistance program have only moderate sized estates. Most such clients have a similar asset structure and have similar and limited estate planning needs which do not require the legal services of an estate planning specialist or team. Many of these clients do not perceive the need for, or are otherwise reluctant to obtain the advice of legal counsel regarding estate planning matters. Consequently, in the absence of objective and thorough legal counseling their estate planning matters are often dealt with in an inadequate and uncoordinated manner.

Despite the clients' needs for certain types of estate planning services and despite the implicit authority to render such services under the legal assistance program, there is a real, albeit subtle and complex, problem of attorney reluctance. This reluctance may result in part from the regrettable overemphasis of tax considerations and complex estate planning techniques. This overemphasis persists both in legal training and in current legal commentary, although admittedly (and thankfully) there is an occasional respite.[6] Such overemphasis causes or reinforces the misperception that all estate planning is riddled with complexity which can be understood only by a specialist. It further implies either that estate planning is a luxury rather than a legal need or that estate planning is relevant only to wealthy individuals. Lastly, this mistaken perception tragically closes the vicious circle by conditioning many attorneys to believe that they cannot render competent estate planning advice.

The purpose of this article is to chip away at that circle by exhibiting that attorney reluctance is far more a problem of perception than a problem of competence. It should be noted that with

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[6] *See, e.g.*, Eubank, *Future* for *Estate Lawyers, 10* REAL PROP., PROB. & TR. J. 223 (1975); Gerhart, *A New Look At Estate Planning: The General Practitioner and Mr. Average,* 50 A.B.A.J. 1043 (1964); Gilman, *Non-Tax Aspects of Estate Planning,* 2 MEMPHIS ST. U.L. REV. 41 (1971); Kinevan, *The Expanding Role of the Lawyer in Estate Planning,* 7 A.F.L. REV. 25 (1965); Martin, *The Draftsman Views Wills for a Young Family,* 54 N.C.L. REV. 227 (1976); Miller, *Steps In Estate Planning for the Small Estate,* 21 TAX LAWYER 312 (1968); Ruther, *Planning for the Medium-Sized, Modern Estate,* 105 TRUSTS & EST. 11 (1966); Shaffer, *Nonestate Planning,* 42 NOTRE DAME LAWYER 153 (1966); Shaffer, *Nonestate Planning,* 106 TRUSTS & EST. 319 (1967); Comment, *Planning Ideas for the Smaller Estate,* 45 MISS. L.J. 454 (1974); *cf.* Weinberger, *The Multiple Roles of the Draftsman, in* PRACTICING LAW INSTITUTE, PRACTICAL WILL DRAFTING (1974).

regard to the military Legal Assistance Officer this is particularly true when the estate planning needs of one's client involve the consideration and analysis of the many military or military-related emoluments.

Many middle-income clients do not request or are not aware of their need for estate planning guidance. It is the thesis of this article that through the legal assistance program, the military attorney has the opportunity, and arguably the affirmative responsibility in certain situations, to apprise the client of that need; to outline the available estate planning alternatives; and, as appropriate, to provide the necessary legal services or recommend the retention of civilian estate planning counsel.

II. THE ARMY LEGAL ASSISTANCE PROGRAM

Although the governing Army regulation[7] and most literature concerning the subject imply the existence of only one legal assistance program, it is conceptually more accurate to distinguish between the "traditional" legal assistance program[8] and the "expanded" legal assistance program which is authorized by the regulation subject to state approval or qualification.[9]

A. THE "TRADITIONAL" PROGRAM

The traditional legal assistance program has been in existence in one form or another since the promulgation of War Department Circular No. 74 in 1943.[10] The initial program was the result of the cooperative efforts of the military and the American Bar Association (ABA) and was based upon a system of referral coordination between military commands and local bar association "committees on war work":

> 1. Sponsorship and purpose.
>
> The War Department and the American Bar Association have agreed to sponsor jointly the following plan to make adequate legal advice and assistance available throughout the Military Establishment to military personnel in the conduct of their personal affairs. . . .
>
> 2. General Supervision.
>
> The general organization, supervision and direction of the plan has been assigned to The Judge Advocate General who will collaborate

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[7] **AR** 608-50.
[8] *Id.* paras. 4*a*(1) & (2); *4b.*
[9] *Id.* paras. 4*a*(3) & 4*d.*
[10] War Dep't Circular No. 74 (Mar. 16, 1943). This Circular was entitled "Legal Advice and Assistance For Military Personnel."

> with the Committee on War Work of the American Bar Association. Similarly, the staff judge advocates of the service commands will collaborate with the committees on war work of the several State bar associations within their respective service commands to aid in the establishment and uniform operation of the plan.[11]

Prior to the establishment of this official program, there was no general plan or procedure through which military personnel could obtain the satisfactory resolution of their legal problems. The only avenue available was the individual employment of civilian attorneys. Because many servicemen were unfamiliar with the retention and use of attorneys and because the disruption of normal life brought about by the outbreak of the war produced a great volume of legal problems for service personnel, the more formal and systematic legal assistance program as embodied in War Circular No. 74 was required:

> The Armed Forces of the United States create for the legal profession of the country a problem. . . . [T]he problem is that men and women called away to military duty from their civilian occupations may have at themoment of departure unsettled questions or continuing contracts or unfinished duties of a legal nature which they cannot abandon and must resolve; and also that after they have departed from their homes such questions may arise, either out of the military service itself or out of the status they have left behind them, which equally demand a proper settlement.[12]

The rendition of such legal services, the exact scope of which will be discussed below, unquestionably has been of great assistance to members of the military community,[13] but it should be recognized that the provision of these legal services neither was then nor is now wholly gratuitous or charitable.

The legal assistance program has always been founded upon a perception of military necessity:

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[11] *Id.* paras. 1 & 2.

[12] Beckwith, ***Legal*** Assistance ***to Military*** Personnel, **29** A.B.A.J. **382 (1943)** [hereinafter cited as Beckwith].

[13] The term "military community" is used because pursuant to AR 608-50, para. 6, legal services are to be provided not only to military members and their dependents but also to retired personnel and their dependents, Department of Army civilian employees serving overseas (other than "local hire" employees) and their accompanying dependents, allied personnel in the United States and their dependents, and post-discharge prisoner personnel confined in the United States Army Disciplinary Barracks. Although not specifically authorized in the Regulation, as a matter of long-standing policy legal assistance services are additionally provided to the survivors of active duty and retired personnel.

Although the Regulation neither makes a distinction nor establishes a priority among these categories of eligible clients, in light of the basic purpose of the program it is recommended that, where necessary and appropriate, the commander exercise the authority granted him under paragraph ***5a*** of the Regulation to assure that legal assistance services are readily available to active duty members and their dependents. See note **4 *supra.***

> [The legal assistance program] is based. . . on the simple truism that efficiency in a military organization is directly related to the peace of mind of its members. Thus, efficiency is reduced to the extent that any member is enmeshed in personal and legal problems. Our continuing aim is to find more effective ways to prevent and, where necessary, resolve these legal and personal problems."

Although very difficult to prove and impossible to quantify, this perceived correlation between an individual's "legal health" (or that of his dependents)[15] and his performance as a service member is the stated basis for the legal assistance program.[16]

The purpose of the program has remained constant since its inception, although the program's procedures and form have changed considerably. The major significance of the early program was that it was almost entirely a referral program by military attorneys in "close cooperation" with civilan legal aid committees. Other than screening clients and providing general office counseling and certain legal drafting services, military attorneys referred most cases to civilian counsel.':

The system worked well during the war years and a very large

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[14] Note, *Legal Assistance,* 15 **JAG** L. REV. 38, 39 (1973).

[15] The definition of "dependent" with regard to a member of the uniformed service is found at 37 U.S.C. § 401 (Supp. V, 1975). It should be noted, however, that the United States Code is riddled with other sections defining "child" and, specifically defining under what circumstances an illegitimate child may claim under the government program in question. *See, e.g.,* 10 U.S.C. § 1447(b)(4)(5) (death gratuity); 38 U.S.C. § 101(4) (title 38 Veterans' Benefits including Dependency and Indemnity Compensation, 38 U.S.C. § 401 *et seq.,* but excepting ch. 19 (Insurance)).

[16]

> Personal legal difficulties may contribute to a state of low morale and inefficiency, and may result in problems requiring disciplinary action. Prompt assistance in resolving these difficulties is an effective preventive measure. Accordingly, it is the policy of the Army to provide legal assistance to all members of the Army and to their dependents.

AR 608-50, para. **2.** While the legal health of active duty personnel and their dependents may well affect the member's morale, efficiency, and conduct and thus be justified on the basis of "military necessity," such reasoning does not appear as relevant to the underlying purpose of the program with regard to the other categories of eligible clients. The rendition of legal services to retirees and their dependents, for example, is essentially a benefit and can only remotely be tied to any justification based upon military necessity. However, because many of the legal or quasi-legal problems faced by retired personnel are intertwined with emoluments earned by years of military service, it could be argued that military attorneys are most able to efficiently and competently render such legal services.

The categorization of other individuals as eligible clients is presumably based upon a number of related factors such as the relative unavailability of civilian attorneys (some civilian employees and their dependents when they "are in the employ of, or accompanying the United States Armed Forces" in a foreign country) or intergovernmental cooperation and convenience (allied force members and their dependents while in this country).

[17] For a more explicit description of the early referral system *see* Blake, *Legal Assistance For Servicemen: A Contribution In War or Peace,* 37 A.B.A.J. 9 (1951).

number of cases were processed;[18] however, some of the unqualified and spirited praise appears in retrospect to have been ill-founded. In 1943 one writer asserted that ". . . nearly the whole problem [of handling service members' legal difficulties] has been resolved and the few outstanding details are on the way to a solution."[19] Another writer, unquestionably one of the greatest early proponents of legal aid in this country, wrote that "[t]he greatest legal aid organization in all history has been created and is being conducted by the Army and Navy of the United States."[20] Although such descriptions may have been accurate during the war years and in the context of the 1940's, they do not describe the subsequent development of military legal assistance from 1946 until the early 1970's.

There has been and continues to be relatively close cooperation between the ABA and the military. However, with the end of hostilities the state committees on war work dissolved and the formal referral system faded.[21] The basic provisions of War Department Circular No. 74 were subsequently incorporated on a more permanent basis into branch regulations, and the legal assistance program was maintained as a matter of permanent policy.

The reason for this rather extended discussion of the inception of the military legal assistance program is that the basic nature of the program, which encompassed general office counseling, limited legal drafting, and referral, was set in 1943. Over the years historical practice grew into solid tradition which is now difficult to alter. Despite considerable changes in the needs of military clients and in the capabilities of military legal assistance offices, general counseling, limited drafting, and perfunctory referrals continue.

It is not surprising that the continuing confusion regarding the types of legal services which may be rendered by LAO's to eligible

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[18] Although very little data were kept, it was estimated by one respected commentator that nearly two million cases were handled in 1943 alone. Smith, ***Legal Aid During the War and After,*** 31 A.B.A.J. 18 (1945) [hereinafter cited as Smith].

[19] Beckwith, ***supra*** note 12, at 382.

[20] Smith, ***supra*** note 18, at 18.

[21] The current procedure for client referral is outlined in AR 608-50, para. 4c:

> **In the United States, case referrals to members of the civilian bar should be made, as appropriate, to the client's family lawyer, Lawyer Referral Service, Legal Aid and Public Defender Organizations, or the Bar Association's Legal Assistance For Servicemen Committee. If none of the aforementioned is available, the client should be given the names of at least three attorneys so that he may select whomever he desires.**

For a number of reasons a great majority of referrals are made pursuant to the last sentence. The client is given a list of local attorneys and allowed to "select whomever he desires." There is at least some evidence that this "referral service" is of limited significance and the actual retention of civilian counsel by active duty members very infrequent. ***See*** Borgen, ***Legal Assistance Items,*** THE ARMY LAWYER, June 1975, at 35-36 (Legal Assistance Program-Enlisted Personnel Survey Results).

clients has directly affected, if not hindered, the full development and implementation of the legal assistance programs themselves. Under the current regulation the "traditional" program contemplates the rendition of office counseling, legal drafting, and all other "professional functions short of actual appearance"" with regard to the "personal legal problems"[23] of the client. These terms offer little guidance to the Legal Assistance Officer, and consequently, the scope of services is frequently defined in the negative: all "personal legal services" will be provided except those which are expressly or impliedly excluded.

There are three express limitations on the types of legal services provided under the legal assistance program. The LAO, whether under the traditional or expanded program, may not represent an individual regarding military criminal matters, military administrative matters, or legal problems relating to private, income-producing activities.[24] As a matter of practice many LAO's further narrow the scope of services provided under the traditional program by not accepting cases "which normally would be accepted by a civilian practitioner on a contingent-fee, or other inherent fee-generating basis [or] cases where some individual, business organization or party is obliged to provide the client with an attorney at no cost to the client...."[25] These officers utilize this provision to limit the scope of their responsibilities despite the fact that the provision is included in the portion of the regulation which deals with the expanded court representation program.

Aside from referring to the broad authority granted by the regulation and to the express limitations discussed immediately above, the individual attorney and the Staff Judge Advocate should consider many other factors before deciding to accept or reject a particular case or before establishing a policy regarding the

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[22] **AR** 608-50, para. 4*a*.

[23] *Id*. paras. 3 & 7.

[24]

Limitations on service provided. a. Military criminal matters. Occasionally. a serviceman accused or suspected of an offense will request advice from the Legal Assistance officer. In such a case, he should be informed of the proper procedures for obtaining counsel. This limitation. however, does not prevent the assignment of the same officer to perform the functions of a Legal Assistance officer and the functions of a defense counsel.

b. Military administrative matters. Various official matters pertaining to servicemen including pay, Government housing, responsibilities for Government property or funds, efficiency reports, administrative letters of reprimand, legality of military orders, conscientious objector procedures, discharge, physical disability entitlements, demotion, administrative board actions, oversea movement, are usually the responsibility of other staff sections or lawyers with the Judge Advocate Office. However, in meritorious cases, the matter should be brought to the attention of the Staff Judge Advocate for further action.

c. Private income-producing business activities of a member are excluded from this program.

Id. para. *8*.

[25] *Id*. para. *4d*.

scope of services to be provided. Some of these factors concern the nature of the case or problem, and others are based upon practical or personal considerations or ethical responsibilities.

The ABA Code of Professional Responsibility[26] has been adopted by the Department of Defense and thereby clearly applies to the LAO.[27] The status of state codes, disciplinary rules and their interpretations is far less clear. While it would seem that such codes apply when a military Legal Assistance Officer is representing military clients in local civilian courts pursuant to the existence of an expanded legal assistance program within that state, the applicability of state codes in other jurisdictions and in non-program cases in expanded program jurisdictions is in question.

Although there are many ways and many contexts in which ethical problems may arise, a few examples may be useful. In all types of cases there is the threshold question as to whether the problem calls for a "legal" resolution or whether another course of action is more advisable. Consider, for example, the divorce inquiry. Many states declare that it is the responsibility of an attorney to first determine if reconciliation appears to be reasonably possible before resorting to or continuing with litigation. The LAO should likewise make that determination. Another example is the responsibility of the attorney, where appropriate, to restrain the client. The military attorney, like his civilian counterpart, has the inherent right and obligation to attempt to restrain his client from a course of conduct which would result in fraud or deception of the court or another party. The LAO is similarly compelled by ethical canons regarding conflicts of interest, improper pleas and motions, and harassment suits.

The ABA Code of Professional Responsibility states that "a lawyer should act with competence and proper care in representing clients. . . and should accept employment only in matters which he is or intends to become competent to handle."[28] Both as a practical matter and as an ethical responsibility, the LAO must evaluate the degree of expertise required to properly handle the case. He may additionally consider the nature of the case in terms of its anticipated duration and its necessity for the continuing participation of counsel. Compare, by way of example, the following three situations: the recovery of a security deposit made by a service member-tenant to a civilian landlord; the filing of a petition for

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[26] ABA CODE OF PROFESSIONAL RESPONSIBILITY (Final Draft 1969).
[27] *See, e.g.*, AR 608-50, para. 9. *See generally* LEGAL ASSISTANCE HANDBOOK, *supra* note 1, Chapt. 1.
[28] EC 6-1, ABA CANONS OF PROFESSIONAL ETHICS (1968).

divorce; and the preparation of a complicated estate plan—a subject which will obviously be discussed in far greater detail below.

The landlord-tenant problem may not be unduly complicated and can be expected to be a relatively quick and routine case with final judgment soon rendered.

The divorce case may take longer because of waiting requirements, service of process delays, jurisdictional disputes, Soldiers' and Sailors' Civil Relief Act stays[29] and so forth. For these reasons the attorney must consider his term of service both within the military and within the legal assistance office before accepting a case. The divorce decree, if obtained, may be interlocutory in nature; however, even if the rendering state requires an appearance in court at the end of the interlocutory period, it is rarely necessary or advantageous for the same attorney to appear.

The estate planning request is more difficult. In this area of the law there are considerable advantages in having one attorney, frequently working in conjunction with an accountant and insurance representative, handle the estate for a period of years. These advantages stem from the need for periodic review of the client's assets, income-flows and his family structure and responsibilities. Although there are numerous types of estate planning requests and cases which may be accepted, there are likewise many instances where for the above reasons, acceptance of the case may be inappropriate.

Because of the many different types of cases and circumstances, it is advisable for the LAO and the Staff Judge Advocate to establish a flexible policy. Establishing general guidelines should prove advantageous for the potential clients, the LAO and the office. Such guidelines may do little more than express that which should have been considered implicitly, but they may also serve as notice to otherwise eligible clients and as a useful reminder to the LAO.

Apart from the issues relating to ethical considerations and the nature of the case, the LAO must consider certain practical limitations. Acceptance or referral of a case is, at some point, validly based upon the capacity of the officer and of the office to adequately handle the case. Aside from the limitations on his own time, the officer must consider his paralegal and secretarial support as well as his research facilities. In the too frequent instance of severe limitations on such support and facilities, the officer, with the concurrence and approval of his Staff Judge Advocate, must

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[29] 50 U.S.C. APP. § 521 (1970). ***Seegenerally*** U.S. DEP'T OF ARMY, PAMPHLET NO. 27-166, SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (1971).

balance the needs of the eligible but competing clients.

This discussion concerning ethical and practical considerations does not presume to be exhaustive, but it hopefully elucidates, to a degree, the multitude of factors which are or should be evaluated prior to accepting or rejecting a case or problem posed by an otherwise eligible client. Many members of the military community have the mistaken belief that if one is eligible for legal assistance, then the scope of the services which may be demanded is limitless.[30] For the many reasons discussed above this belief is ill-founded.

It is incumbent upon the legal assistance office to establish, to the extent possible, a comprehensive policy which will treat similar cases in a consistent manner. Recognizing the differences in backgrounds and expertise of individual attorneys, the policy may encourage a certain degree of specialization within the office. Nonetheless, limiting the scope of estate planning services may be inevitable. The primary mission of the legal assistance program is to render ***competent,*** not unlimited, legal services, and fulfilling this goal requires a close periodic review of office policies and practices.

B. THE "EXPANDED" LEGAL ASSISTANCE PROGRAM

For years, periodic and informal consideration was given to the concept of expanding the legal assistance program to include full legal representation; however, only in 1969 was concrete action taken. In December 1969 an amendment[31] was added to the Economic Opportunity Act of 1964.[32] That amendment specifically added certain military members and members of their immediate families to the list of persons eligible to receive legal services from attorneys working for the Office of Economic Opportunity (OEO).[33]

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[30] It could be argued that this problem is often a reflection of the style and, too often, the rank of the client.

[31] S. 3016, 91st Cong., 1st Sess. (1969) (Carey Amendment), *amending* § 222 (a) (3) of the Economic Opportunity Act of 1964.

[32] Act of Aug. 20, 1964, Pub. L. No. 85-452, 78 Stat. 508, codified *at* 42 U.S.C. § 2701 et seq. (1970).

[33] Act of Dec. 30, 1970, Pub. L. No. 91-177, § 104(b), 83 Stat. 829, *codified at* 42 U.S.C. § 2809(a)(3) (1970). The relevant section of the Carey Amendment stated:

> In order to stimulate action to meet or deal with particularly critical needs or problems of the poor which are common to a number of communities, the Director [of the Office of Economic Opportunity] may develop and carry on special programs. . . .Programs under this section shall include. . . :
>
> (3) A "Legal Service" program to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation,

While this amendment, referred to as the Carey Amendment, revealed clear congressional interest in providing legal services to members of the Armed Forces and their families, Congress did qualify the rendition of such services in two ways. First, legal services were to be provided to such persons only in cases of "extreme hardship." Secondly, the Director of the Office of Economic Opportunity was not required to develop the program "unless and until the Secretary of Defense assumes the cost of such services."[34]

The implications of the Carey Amendment were considered by some to be particularly significant. The amendment was seen to contain

> . . . two harsh realities for the planners in the Pentagon: (1) there was the threat of a legislative finding that some members of the armed services were living below the "poverty line," and (2) there was also a threat of finding that the military was neither the exclusive nor necessarily the best resource for supplying its members with needed or desirable goods and services. Both findings had implications that the military could not or should not "take care of its own."[35]

In order to fully study the applicability of the amendment and all viable alternatives, the Department of Defense formed a study committee.[36] As a part of its study, the McCartin Committee elicited an Informal Opinion from the ABA Committee on Ethics and Professional Responsibility which dealt with the particular ethical considerations relevant to the staff office military legal aid program under consideration.[37] No ethical objections were found in expanding the existing military legal assistance program to provide for the rendition of total legal services to indigent service members and their dependents. Such services, as contemplated, were to include court representation by JAGC Legal Assistance Officers.

After the four-month study, the McCartin Committee submitted

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legal counseling. education in legal matters, and other appropriate legal services. . . .[M]embers of the Armed Forces. and members of their immediate families, shall be eligible to obtain legal services under such programs in cases of extreme hardship (determined in accordance with regulations of the Director issued after consultation with the Secretary of Defense): Provided, that nothing in this sentence will be so construed as to require the Director to expand or enlarge existing programs or to initiate new programs in order to carry out the provisions of this sentence unless and until the Secretary of Defense assumes the cost of such services and has reached agreement with the Director on reimbursement for all such additional costs as may be incurred in carrying out the provisions of this sentence.

[34] *Id.*

[35] Marks, *Military Lawyers, Civilian Courts, and the Organized Bar: A Case Study of the Unauthorized Practice Dilemma, 56* MIL. L. REV. 1, 8 (1972).

[36] The study committee, chaired by Colonel George J. McCartin. Jr. . was known as the Department of Defense Military Working Group on Expansion of Legal Assistance Programs [hereinafter denominated McCartin Committee].

[37] ABA COMM. O S ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINION NO. 1166 (1970).

its report to the Secretary of Defense and made the following recommendations:

1. That the traditional Legal Assistance Program be expanded "to the extent permissible and supportable in order to meet the needs recognized by Congress. . . ";
2. That such expanded services be given only to those members and dependents "who cannot reasonably afford to pay a fee for needed services"; and
3. That a pilot program be developed to serve as a basis for evaluation of these proposals.[38]

The McCartin Committee implicitly made another recommendation when it expressed the opinion that coordination with and approval of the ABA were essential to any expansion of the existing legal assistance program. This approach was accepted and DoD subsequently did request the support of the ABA.[39]

The ABA extended its support and on August 13, 1970 the Board of Governors passed the following resolutions of broad, but qualified, approval:

> RESOLVED, that the American Bar Association supports the expansion of existing military legal assistance programs through the establishment of properly supported pilot, or test program(s) in such states as cooperate and agree with the objectives of giving complete legal services to members of the Armed Forces and their dependents through the expansion of existing military legal assistance programs, subject to such limitations, as to which the Department of Defense and the states and civilian bar associations may agree; and it is further
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> RESOLVED, that the results, information, and data developed by the program(s) be made available to the American Bar Association and the Office of Economic Opportunity so that, with the Department of Defense, mutually satisfactory decisions can be made about the continuance or discontinuance of these expanded efforts to provide complete legal services to military personnel and their dependents who are unable to pay legal fees.[40]

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[38] REPORT OF DEPARTMENT OF DEFENSE MILITARY WORKING GROUP ON EXPANSION OF LEGAL ASSISTANCE PROGRAMS § III [hereinafter cited as MCCARTIN REPORT 3.
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> A Department of Defense Study Group [the McCartin Committee] has completed a comprehensive preliminary study of [rendering extended legal services to financially-qualifying military members and their dependents] and has submitted its report to me recommending that a pilot program be established under which Department of Defense attorneys would provide, during the test period, legal services of the kind which OEO programs could provide. I have approved this recommendation and will direct establishment of a test program at one or more geographical locations ***if assurances of support are received from the American Bar Association. I fully realize that the establishment of any test programs as well as any subsequent long-range programs depends upon receiving support from the American Bar Association and other civilian groups and officials.*** Under the contemplated expanded Legal Assistance Program, Defense Department attorneys would provide complete legal services, including appearance in civilian courts, to military personnel and their dependents who are unable to pay a fee to a civilian attorney.

Letter from Secretary of Defense Melvin Laird to Bernard Segal, President of the American Bar Association, May 1970 (emphasis added).

[40] ABA Board of Governors Resolutions, St. Louis, Missouri, August 13, 1970.

The ABA resolutions incorporated two qualifications. The first qualification related to the question of economic eligibility. "Complete legal services" were to be rendered only to those "military personnel and their dependents *who* ***are unable*** *to* ***pay legal fees.***"[41] Secondly, the approval itself was conditioned upon and subject to subsequent concurring approval by local bar associations. The Board of Governors' resolutions effectively deferred the final decisions to the "states and civilian bar associations" despite the verbal dressing of putative "approval." In light of the "federated" nature of the **ABA,** this deference to the bar associations may have been wholly appropriate; however, the military community placed too much optimism upon the quick response of the Board of Governors' resolutions. **As** will be discussed below, some of the local bars and state judiciaries were receptive to the program. Others reacted with a mixed blend of caution and hostility.

The resolutions clearly recognized the states' plenary power to control access to their respective courts and to regulate the practice of law within their jurisdiction, subject only to constitutional limitations. The resolutions, in effect, placed the Department of Defense in a negotiating position with the state courts and bar associations. Such negotiation would have been unnecessary if a different assignment policy had been implemented. If JAGC officers serving as LAO's were assigned only to the state(s) where they were admitted to practice law, requests to the state courts and bars would have been unnecessary.42 Such a plan was thought impractical and unmanageable, and thus the services based the program upon the assumption that active duty attorneys who were not members of the local bar would be serving as LAO's.

In fall, 1970, the program was approved for implementation by DoD on an experimental or "pilot" basis. Although some guidelines were made regarding the types of cases which were to be beyond the scope of the program,[43] DoD essentially allowed each military

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[41] *Id.* (emphasis added).

[42] This "assignment-policy" approach offered the virtue of simplicity because it would remove the necessity of seeking state court liberalization of *pro hac vice* rules. and some would argue that there were even secondary merits. For example, this author, a California attorney, in order to evidence his good faith support of this approach, contemplated volunteering for hardship duty as the LAO at the Presidio of San Francisco.

[43] Many of the original guidelines concerning the scope of the court-representation program were subsequently incorporated into the governing Department of Army Regulation, AR 608-50. ***See*** text accompanying note 50 infra. ***See*** *also* text accompanying notes 9 & 25 supra.

department to implement the program in its own way.

The Army was the first service to receive authorization from a state for a fully operational test. In early 1971 the first pilot programs were initiated at Fort Dix and Fort Monmouth, New Jersey. By spring of 1972, 17 states had granted some form of permission for such "foreign" attorneys to practice in certain types of cases within their jurisdiction. Negotiations were still being conducted in seven other states and only four states had refused to negotiate or had disapproved such practice by out-of-state military attorneys.

The objections of the states were basically two-fold. First, there was the natural consideration of whether such out-of-state attorneys could adequately represent clients in a jurisdiction in which they were not admitted to practice. The second major consideration was, in a sense, less noble. Despite assurances that the services were to be limited to those military personnel or dependents "unable to afford civilian counsel" and who evidenced such inability by meeting strict income-eligibility standards, many local practitioners feared a loss of income and business.44

The degrees of success of the pilot programs varied radically from state to state and from installation to installation. The relative success of each program depended upon many factors and was in part contingent upon the nature of the agreement with the local bar association and the degree of freedom allowed by the state courts. Monitoring and evaluation of these "pilot programs" continued until early 1973. At that time each service prepared final reports which praised the programs in various adjectival degrees and recommended that the court representation program be established as a permanent part of the military legal assistance program.

The recommendations were followed, and the expanded program is now putatively a permanent part of the DoD legal assistance program. The use of the word "putatively" seems appropriate for a number of reasons. First, the expanded program inevitably is a function of manpower, funding, and resources, and is dependent upon the agreement with and support of the civilian bar and the permission of the judiciary. These qualifications and limitations were explicitly incorporated in the governing regulation,

> court representation programs presently existing [22 February 1974] pursuant *to* Department of Army letters will be continued on a permanent

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44 Just as the ABA extended great deference to the individual state bar associations, there is considerable evidence that state bar associations similarly deferred to the views of the local bar associations. ***See generally*** Marks, *supra* note **35,** at 31.

> basis. Not all states permit court representation. Programs in additional states will be established at the discretion of The Judge Advocate General as resources permit.[45]

Second, even assuming the existence of a program at a particular installation, eligibility for legal services under the program is limited. Court representation is available only to "those members and dependents who are unable to pay legal fees for the services involved without substantial hardship to themselves or [their] families."[46] Third, even if there is a court representation program and even assuming the individual can establish his financial inability to retain civilian counsel, only certain types of cases may be accepted. Originally the LAO assigned to these programs was "authorized to represent eligible clients in Federal and State courts at the trial and appellate levels in civil and criminal matters."[47] Despite having been intimately involved with the expanded legal assistance program for the last three years, this author is unaware of any instance in which a LAO has, under this program, litigated a case in any federal court other than a federal magistrate's court or of any instance in which a LAO has appeared at the appellate level of a state court. Fourth, the authorization to represent clients in criminal matters has been qualified and restricted as a result of manpower and resource constraints.[48] Moreover, even in civil matters the LAO may not ordinarily represent clients in cases "against the Federal Government or where the Federal Government is otherwise a party to the action."[49] Finally, contingent fee cases or cases where "some individual, business organization or party is obligated to provide the client with an attorney at no cost to

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[45] AR 608-50, para. *4d.*

[46] *Id* para. 3*a*(3). Following the recommendation of the McCartin Committee. the general *guideline* for financial eligibility is that court representation will be available under an expanded program to military personnel in the grade of **E-4** *or* below and their dependents. *See* Marks, *supra* note 35, at 10.

[47] AR 608-50, para. 4*d*(1).

[48] The Judge Advocate General, in a letter dated *30* December 1974, qualified and restricted court representation of eligible clients in criminal cases. The relevant section of that letter-provided:

> Assuming compliance with existing eligibility standards and the agreement of the local bar and judiciary. misdemeanor cases involving military personnel may be handled through ELAP if the appropriate Staff Judge Advocate determines that his resources are sufficient. Felony cases will not be defended without the specific permission of the SJA, after consideration of the time. effort and special nature of the case and the availability of comparable representation through an existing local civilian program. In the event the decision is made to provide a military defense counsel in a par. ticular felony case. The Judge Advocate General (ATTN. DAJA-LA) will be notified before any action is taken by the counsel.

[49] AR 608-50, para, 4*d*(2). *See* Borgen, *Legal Assistance Items,* THE ARMY LAWYER. Dec. 1975, at *33* (LAO in an expanded program may not represent a servicemember or his dependent in a garnishment proceeding brought under **42** U.S.C.§ 659).

the client" may not be accepted.[50]

A great amount of commendable effort has been invested in the expanded program. However, its inherent limitations, the complexities of organization and the limitations of resources limit its long-range effectiveness. It is recommended that the legal assistance program focus upon further developing and improving the legal services provided under the traditional legal assistance program. The goal of rendering competent legal services to all members of the military community under the traditional program is a sufficiently challenging mission.

III. DEFINITION OF ESTATE PLANNING

The precise meaning of the phrase "estate planning" is elusive. Despite the fact that it is clearly recognized as a specialized field of legal practice,[51] its boundaries overlap with many other areas of legal practice such as federal and state income, gift, and estate taxation; trusts and future interests; probate and the administration of estates; community property; and real and personal property. Furthermore, the boundaries overlap with other fields, such as personal financial and investment counseling and accounting, which traditionally have been considered to be outside the scope of legal practice. Due to the breadth of estate planning considerations, for large estates it is oftentimes necessary to use an estate planning "team" of attorneys, investment counselors, life insurance agents, and accountants. Conversely, for moderate-size estates, most estate planning services can be rendered competently by a single attorney.

Despite the elusiveness of the phrase, a working definition of "estate planning" is needed. A clear, summary definition, as stated by one writer, is as follows:

> "Estate Planning" . . . is the informed arrangement of one's affairs to maximize the benefit of wealth during lifetime, to minimize the difficulty and expense of transfer of wealth upon death, and to place the enjoyment of that wealth with those beneficiaries and in the manner of one's choosing.[52]

For purposes of this article this definition is adopted; however, the phrase "estate planning" is further divided into four separate, con-

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[50] AR *608-50,* para. 4*d*(3).

[51] For interesting discussions of the development and future of estate planning as a legal speciality *see* Becker, Becker & Johnson, ***Ideas, Techniques, and Trends in Estate Planning, 52*** TAXES ***655 (1974); Seminar on Estate Lawyers 1975-2000,*** 10 REAL PROP., PROB. & TR. J. ***223 (1975).***

[52] PASQUESI, PLANNING AND DRAFTING FOR THE ESTATE UNDER $100,000 § ***1.2 (1974).***

ceptual elements: Lifetime Estate Planning, Dispositive Estate Planning, Survivors' Estate Planning, and Post-Mortem Estate Planning.

Lifetime estate planning focuses upon the maximization of one's wealth and the benefits therefrom during life. A client ordinarily will attempt to achieve a relative degree of financial security for himself and his family and will attempt to maximize the size of his estate. Such financial security and estate maximization will consist, consciously or otherwise, of protection against the untimely or premature death of a family member and of savings in order to provide transitional or emergency funds in the event of an untimely death. It may additionally incorporate an investment plan which hopefully is at least an effective hedge against the consequences of inflation and is at best a plan for estate maximization. Lifetime estate planning is unquestionably related to personal financial and investment counseling and to survivors' estate planning, which is discussed below.

Dispositive estate planning comports most closely with the common perception of the phrase "estate planning." The goal of dispositive estate planning is to provide for the transfer of one's property upon death.[53] Ideally this transfer of wealth will be accomplished so as to place the enjoyment of one's wealth with selected beneficiaries in a manner of one's choosing with a minimum of delay and inconvenience, and with a minimum of shrinkage resulting from taxes, probate expenses, attorney's fees, and liquidation losses.[54]

The third definitional element of the phrase "estate planning'' is survivors' estate planning. This is the planning of one's estate in order to provide for the long-range financial security of one's survivors in the event of untimely or premature death. Survivors' estate planning should be distinguished from what is often referred

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[53] For a criticism of the phrase "estate planning" precisely because it primarily "impl[ies] planning for the disposition of one's property after death" rather than stressing lifetime estate planning ***see*** H. HARRIS, FAMILY ESTATE PLANNING (1971). Mr. Harris argues that the presence and significance of lifetime estate planning suggest the term "family estate planning."

[54] A great majority of the literature on the subject of estate planning deals with dispositive estate planning. Although an analysis of the techniques of wealth transmission is beyond the scope of the article, the term "dispositive estate planning" may be clarified by identifying the three general methods of such transmission: testamentary distribution; will substitutes (*e.g.*, survivorship interests, life insurance, ***inter*** *vivos* gifts and trusts); and state laws of intestacy.

Many, if not most, members of the military community do have a will; however, the wealth of most middle-income families is transferred at death through the use of certain will substitutes rather than via such testamentary distribution. ***See*** text accompanying note 67 *infra*.

to as post-mortem estate planning. Survivors' estate planning is based upon the analysis of the probable financial position of one's survivors ***assuming*** the untimely or premature demise of the client. Prospective in nature, the goal of survivors' estate planning is to organize one's estate so as to afford long-range financial security to one's survivors for a set or indefinite period after his death.

Post-mortem planning is different. Post-mortem estate planning is far more limited and occurs ***after*** the death of an individual. It is, in a sense, second-generational lifetime estate planning. In other words, ***given*** the death of an individual, the goal of post-mortem estate planning is to transmit the deceased's wealth with a minimum of difficulty and shrinkage. Post-mortem estate planning is temporary and transitional in nature and ordinarily ceases upon the termination of administration of the estate. The opportunities and dimensions of post-mortem estate planning suffer from the constraints and inflexibilities imposed by the deceased's will, the implications of will substitutes or state laws of intestacy.

The role of the attorney in rendering lifetime, dispositive, survivors' and post-mortem estate planning services to middle-income military members is largely a function of the size and structure of the client's estate and, to a degree, is dependent upon the attitudes and perceptions of the client. In the next section certain aspects of the middle-income military client and of his probate estate will be analyzed in the context of the definition posited above.

IV. THE ESTATE PLANNING CLIENT

A. THE SIZE OF THE ESTATE

Most American families do not live in the style to which they had once "hoped to become accustomed to." Instead, and with varying degrees of difficulty, we quietly accept F. Scott Fitzgerald's famous remark about the "very rich"— "they are different from you and me."[55] Most American families and a great majority of those clients who request legal services under the legal assistance program are not "very rich."[56] Their annual income denominates them a

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[55] This remark is neither intended as a statement of resignation nor intended to denigrate in any manner the efforts at "lifetime estate planning" or estate accumulation which are discussed in a subsequent section of this article. It is true we may believe Fitzgerald, but we never completely forget that other famous remark— "I've been rich and I've been poor, and rich is better."

[56] One indication of wealth is, of course, annual income. With regard to active duty members, the approximate range of annual incomes is ascertainable. The annual income range of this category of clients is from approximately $5100 (E1) to **$42,300**

middle-income family; and, relatedly, their limited ownership of property characterizes them as a family of moderate wealth.

Defining the exact meaning and fixing the exact quantitative boundaries of the terms "middle-income" and "moderate wealth" are extremely difficult, but fortunately not of extreme significance. "The need for family estate planning is not (or, at least, should not be) measured solely in dollars,"[57] and, thus, the *exact* meaning and the *exact* boundaries are of only limited relevance in ascertaining the estate planning needs of a family.[58] A quantitative figure is ventured below merely for purposes of convenience and conception, but it is not intended to imply any significant theoretical precision. Estate planning for middle income/moderate wealth[59] families merely presupposes the availability of a certain amount of disposable income which facilitates a range of lifetime estate planning alternatives and the ownership of a certain amount of property which necessitates some dispositive estate planning.[60]

Most writers who have discussed this type of estate planning have fixed the size of the hypothetical client's gross estate at approximately $100,000.[61] An estate of this size comports roughly

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(0-10, over 26 years, with dependents.). It must be recognized that these figures may understate income in that they do not reflect supplementary income flows from investment, spousal employment, and secondary employment. Furthermore, because of the many sources of imputed income such as military medical services, government provided housing, commissaries and the post exchange system, the above income figures understate the real annual income of the active duty member. The degree of disparity between real and actual income is the subject of considerable debate.

[57] H. HARRIS. FAMILY ESTATE PLANNING GUIDE 5 (1971). Chapters of the booklet *Why Family Estate Planning* written by Mr. Harris were published seriatim in *The Retired Officer* from July 1974 through May 1975.

[58] For a brilliant article "propos[ing] and explain[ing] a will form for the young and promising but presently impecunious" individual who has nothing but a "nonestate of children and debts," *see* Shaffer, *Nonstate Planning*, 42 NOTRE DAME LAWYER 153 (1966). *See also* Martin, *The Draftsman Views Wills for a Young Family*, 54 N.C.L. REV. 227 (1976).

[59] These two terms are both extremely important in the context of estate planning as defined for purposes of this article. *See* Section III *supra*. The income flow of a client is the condition precedent to all "lifetime estate planning" and is ordinarily the source of estate accumulation. Alternatively, the source of the client's existing or expectant estate could be inheritances, gifts, or other windfalls. The terms at times will be used interchangeably unless a specific or contextual distinction is made. This use of terms is made despite the fact, of course, that one's accumulation of wealth is a function not only of income but also of savings habits or goals and expenditures.

[60] *See* text accompanying notes 67-70 *infra*.

[61] T. PASQUESI. PLANNING AND DRAFTING FOR THE ESTATE UNDER $100,000 (1972); J. TRACHTMAN, ESTATE PLANKING xi (1965); Gerhart, *A New Look At Estate Planning: The General Practitioner and Mr. Average*, 50 A.B.A.J. 1043 (1964) (The client of "moderate means" is defined as an individual "whose estate may run as high as $60,000 but not above $100,000.") *Id.* at 1045; Gilman, *Non-Tax Aspects of Estate Planning*, 2 MEMPHIS ST. U.L. REV. 41 (1971) ("A small estate will be assumed to be

with most persons' conception of a moderate-sized estate, but in the context of this article it is far more significant that estates of this size do not require (or provoke) extensive tax planning. As pointed out by one leading estate planning commentator, "[o]ne does not become seriously entangled in Federal tax problems with less than $100,000; and it takes much more to produce the heavy questions."[62] Although it is difficult to have violent disagreement

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one whose adjusted gross estate for tax purposes (gross estate less expenses, debts, certain taxes, and casualty losses) is less than $60,000."). *Id.* at 41. *But see* Martin, *The Draftsman Views Wills for a Young Family*, 54 N.C.L. REV. 227 (1976). Although unquestionably Professor Martin's article is one of the best articles written in recent years on the subject of will drafting and estate planning (as defined in this article) for the young middle-income family, he makes a curious and seemingly over-restrictive definition of the size of the estate of the average testator. He correctly notes that "due to the availability of the marital deduction [INT. REV. CODE OF 1954, § 2056], a married person's estate generally will not pay estate tax until its value is something in excess of $120,000," but he then places emphasis upon the mere necessity of filing a federal estate tax return which is, of course, triggered when the value of the decedent's assets exceeds $60,000. INT. REV. CODE OF 1954, § 6018(a). He concludes that "[s]ince the necessity of filing a return provokes some notice of tax ramifications and the smaller estate on which this article will focus does not present federal tax problems, it seems appropriate to define the smaller estate as one under $60,000 in value." Martin, *supra*, at 228 n.3. Ordinarily the mere necessity of filing a return should not and would not affect an individual's estate plan. There is no federal tax problem unless and until there is a *taxable* estate as opposed to a gross estate or an adjusted gross estate.

[62] J. TRACHTMAN, ESTATE PLANNING ix (1965). Although complicated estate tax planning is beyond the scope of this article inevitable references to and discussion of federal estate taxation will be included. The following schematic analysis of the federal estate tax structure may be helpful in understanding and evaluating the relevance (or lack thereof) of tax planning to the middle-income military family.

Chapter 11, Subtitle B of the Internal Revenue Code 1954 is the source of the federal estate tax law. Subchapter A (§§ 2001-2056) deals with estates of citizens or residents, Subchapter B (§§ 2101-2108) concerns the estates of nonresidents who were not citizens, and Subchapter C (§§ 2201-2209) contains miscellaneous provisions.

The reach of the estate tax is broad. For example, the definition of the gross estate includes "The value at the time of . . . death of all property, real or personal, tangible or intangible, wherever situated." INT. REV. CODE OF 1954 § 2031(a). *But see id.* § 2032 which provides that the executor may elect to value the estate at a date six months after the decedent's death. The decedent's gross estate includes assets which may have been transferred by the decedent prior to his death or which may pass outside his probate estate. The general provision which operates to bring property into the decedent's estate for federal tax purposes is § 2033 which includes "the value of all property to the extent of the interest therein of the decedent at the time of his death." The following section, § 2034, includes dower or curtesy interests.

Inter vivos transfers which have the effect of transfers at death cannot remove property from a decedent's taxable estate. For instance, property transferred within three years of death (except for an adequate and full consideration) is presumptively included in the gross estate. INT. REV. CODE OF 1954 § 2035. Likewise, transfers with a retained life estate, *id.*, § 2036, transfers taking effect at death, *id.* § 2037; revocable transfers, *id.* § 2039; and annuities, *id.* § 2039 are included in the estate for federal tax purposes. It is worthy of note that the SBP and RSFPP are expressly excluded from this final provision by virtue of Section 2039 (c)(4) of the Code. Also included are joint interests except to the extent that the survivor's contribution can be shown, *id.*, § 2040; the proceeds of life insurance if payable to the estate or any other beneficiary

with this position, a slightly different approach is recommended.

Families with smaller estates will in all probability not have any major federal tax problems; however, there may be some probate and other nontax considerations which merit the legal services of the LAO. Moreover, a family with a considerably larger estate may still have only limited federal tax problems due to the asset structure of the estate,[63] the progressive nature of the estate tax,[64] the availability of the marital deduction to married clients,[65] and, possibly most important, the expected increase in the specific exemption in the very near future.[66]

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unless the decedent retained no incidents of ownership greater than 5% reversionary interest, *id.*, § 2042; as well as the difference between fair market value at the time of death and the amount paid for any property if it was initially transferred for an insufficient consideration, *id.*, § 2043. Finally, the gross estate for federal tax purposes includes property over which the decedent possessed a general power of appointment, *id.*, § 2041.

The basic formula for determining the federal estate tax is outlined below.

	GROSS ESTATE OF DECEDENT (§§ 2031-2044)
MINUS	Expenses of Administration, Decedent's Indebtedness, and Taxes (§ 2053)
	Casualty Losses Incurred During the Settlement of the Estate (§ 20641
EQUALS	ADJUSTED GROSS ESTATE (§ 2056(a)(2))
MINUS	$60,000 Exemption (§ 2052) [NOTE: This amount has been increased by the Tax Reform Act of Oct. 4. 1976, Pub. L. *So.* 94-445. § 2201. Stat *Ed.]*
	Transfers tor Public, Charitable, and Religious Uses (§ 2055)
	Marital Deduction (§ 2056)
EQUALS	TAXABLEESTATE
TO WHICH IS APPLIED	The Rate of Tax (§ 2001)
TO DETERMINE	TAX LIABILITY
WHICH IS REDUCED BY	TAX CREDITS
	State Death Tax Credit (§ 2011)
	Gift Tax Credit (§ 2012)
	Credit for Tax on Prior Transfers (§ 2013)
	Foreign Death Tax Credit (§ 2014)
	Credit for Death Taxes on Remainders (§ 2015)

For a brief, but useful, narrative description of the federal estate tax *see* INTERNAL REVENUE SERVICE, PUB NO 448, A GUIDE TO FEDERAL ESTATE AND GIFT TAXATION (1975) (distributed annually to all U.S. Army Legal Assistance Officers by the Office of The Judge Advocate General). For a far more thorough, but still extremely readable text, *see* KAHN & COLSON, FEDERAL TAXATION OF ESTATES, GIFTS AND TRUSTS (2d ed. 1975).

[63] *See* Section IV.B. *infra*.

[64] INT. REV. CODE OF 1954, § 2001.

[65] *Id.* § 2040.

[66] The amount of the specific exemption has not changed since 1942 despite the obvious effects of inflation. In recent years, there has been a plethora of bills introduced in Congress which would provide some relief from the combined effects of inflation and the graduated rates of the estate tax. The bills generally fall into one of three categories: those which propose to simply increase the amount of the specific exemption; those which propose an unlimited marital deduction; and those which propose that the value of one's personal residence or one's farm be excluded from the definition of the gross estate. Although it is speculative as to which approach the final legislation will adopt, it is extremely likely that some change will be enacted

For the purposes of this article, and again stressing that quantitative amounts are only an indicator of estate planning needs, estates with values between $50,000 and $250,000 will be denominated "moderate-sized estates." This range of estate values is common to many clients who seek legal assistance services and need, knowingly or otherwise, estate planning services. The LAO must be particularly alert to apprise eligible clients who have such moderate-sized estates of estate planning considerations. Many of these services can and should be competently rendered by the LAO under the traditional legal assistance program.

B. COMMONALITY OF ASSET STRUCTURE

Clients' lifetime estate planning practices and goals and clients' dispositive desires and schemes may vary radically. However, there is one common element: the ***manner*** in which low and middle income clients hold their wealth is ordinarily very similar. This manner of holding wealth or "asset structure" has two aspects of particular estate planning significance. First, in most instances the types or composition of the assets is relatively undiversified in nature and relatively similar from one such client to another. Secondly, a great majority of property of married clients is held, for better or worse, in some form of joint ownership with the spouse.[67] Both of these statements are generally true whether we are speaking of Professor Shaffer's "nonestate client,"[68] Mr. Gerhart's "Mr. Average"[69] or the LAO's middle-income military client. There are

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within the next several years. [Note: The Congress has, in its own way, adopted all of these approaches. It has increased both the specific exemption and the marital deduction, and permitted family farms to be valued at a lower rate than at their "highest and best" use. Act of Oct. 4, 1976, Pub. L. No. 94-445, §§ 2201-2203, Stat. .-Ed.]

[67] *See, e.g.*, Campfield, *Estate Planning For Joint Tenancies,* 1974 DUKE L.J. 669 ("Joint ownership of real and personal property by husband and wife in a common law jurisdiction is so generally accepted that to hold property in the name of only one spouse is the exception rather than the rule."). *Id.* at 670. Professor Campfield aptly identifies a number of situations in which joint ownership of property is disadvantageous despite the frequent counsel of bank personnel, real estate people, and, indeed, many lawyers. *See also* Sacher, *Estate Planning and Joint Tenancy With Right of Survivorship,* 50 NOTRE DAME LAWYER 618 (1975); Worthy, *Problems of Jointly Owned Property,* 22 TAX LAWYER 601 (1969); Note, *Joint Tenancy: Select Methods of Escaping Its Undesirable Consequences,* 43 U.M.K.C. L. REV. 60 (1974); Mills, *Community Joint Tenancy—A Paradoxical Problem in Estate Administration,* 49 CAL. ST. B.J. 38 (1974); *cf.* Randall, *Community Property Agreements, Joint Tenancies, and Taxes,* 10 GONZAGA L. REV. 109 (1974).

[68] Shaffer, *Nonestate Planning,* 42 NOTRE DAME LAWYER 153 (1966).

[69] Gerhart, *A New Look At Estate Planning: The General Practitioner and Mr. Average,* 50 A.B.A.J. 1043 (1964). Gerhart describes four categories of clients' estates and then identifies "Mr. Average":

some variations between each of these categories and, of course, between each client, but the basic propositions are the same. Certain types of property are common to and dominate the asset structure of limited and moderate wealth families and ordinarily such assets will be held in joint ownership if the client is married.

The estates of middle-income families will ordinarily consist of a certain amount of liquid assets in the form of cash, savings and checking accounts, certificates of deposit,[70] United States savings bonds, and possibly a limited quantity of stocks and bonds. The client will own a certain amount of tangible personal property, some government and possibly some commercial insurance or annuity policies, and he may have somevested or expectant employee benefits. Oftentimes the client will, in addition, have an equity interest in his personal residence, and he may own some rental or other investment property.

Compare this summary estate description with an analysis of the basic asset structure in the context of survivors' estate planning. If a client were to die (assuming a conforming dispositive scheme), the survivors ordinarily would have access to the deceased's personal property, to the equity interest in any real estate owned by the decedent, to the proceeds of the insurance and annuity contracts, employee benefits, and either the social security mother's allowance or social security retirement income based upon the deceased's covered employment.

It would appear that the above descriptions summarize the estates of most middle-income families; however, in one sense that is *incorrect.* More precisely, with regard to one subcategory of middle-

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> First: The salaried man whose main assets are life insurance and his home.
>
> Second: The 'man who owns a business interest, often a closely held family corporation.
>
> Third: The wealthy man who has a nice portfolio of blue chip stocks.
>
> Fourth: The extremely wealthy executive of a large corporation who gets the benefit of a deferred compensation plan.
>
> Obviously Mr. Joe Average is not the third or fourth [category]. The vast majority of the general practitioner's clients will fall in his first two classes.

Id. at 1045.

Most military legal assistance clients will fall in either the first or second category just like the "vast majority of the general practitioner's clients."

[70] It is debatable whether or not monies invested in a certificate of deposit should be considered a liquid asset. It could be argued that this categorization would depend upon the relevant term or the time remaining until the redemption of the certificate. It has been included here as a liquid asset since it can be immediately cashed for an ascertainable amount, albeit with the imposition of a penalty.

income clients the above description is incomplete. That subcategory consists of members of the military community.

The uniqueness of the estate of the military member or former member becomes particularly apparent when the scope and nature of employee benefits are considered. As is implied by the above description, the estates of most Americans consist primarily of private wealth with supplementary contingent wealth flowing from government insurance policies and the federal social security program. The estate of the military client is similar except that there is also a multitude of additional, and oftentimes complicated, military or military-related emoluments available to the military member and his family.

It is far beyond the scope of this article to describe and analyze each of these military or military-related emoluments. Furthermore, unlike many other aspects of military legal assistance practice, there is a considerable volume of excellent material concerning such subjects already prepared and ordinarily available to or obtainable by the military LAO.[71] These emoluments are assets and some of them are of major estate planning significance. Consider, for example, military retired or disability pay, the government insurance and annuity plans, Veterans' Administration payments or pensions, and survivors' educational assistance programs. Other emoluments, if considered individually, may be of limited importance in a particular case; however, cumulatively these emoluments may be of major significance to the client or his family. The attorney should be aware of these employment-related assets if he is to render comprehensive estate planning counseling to the military client.

Some of the major emoluments and benefits which may have estate planning significance are listed and briefly described below. The list is not exhaustive and is limited to identifying only those emoluments available to the survivors of active duty and retired members. Furthermore, the descriptions are not detailed, but in light of the specific purpose of this section and the general thesis of this article that is unimportant. The list and the descriptions are included only to foreshadow one of the primary conclusions of this author — that because of the number and relative complexity of military or military-related emoluments, the military LAO ordinarily has ***more*** competence than the civilian general practitioner in the rendition of estate planning counseling and service to certain military clients.

For a more detailed description of these and other emoluments

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[71] *See* note 2 *supra.*

and benefits reference should be made to the publications and articles listed previously.[72]

C. MILITARY OR MILITARY RELATED EMOLUMENTS AVAILABLE TO THE SURVIVORS OF ACTIVE DUTY OR RETIRED MEMBERS[73]

1. Monetary Emoluments: Department of Army.[74]

a. Death Gratuity.[75] A cash payment equal to six months' basic pay, plus special, incentive, and proficiency pay is payable to statutorily designated beneficiaries provided that the member's death occurred on active duty or within 120 days after retirement or separation and is due to disease or injury incurred or aggravated by active service. The minimum death gratuity is $800; the maximum is $3000.

b. Military Annuity Plans. Retired Servicemen's Family Protection Plan (RSFPP).[76] The RSFPP program, now closed to new participants, permitted a service member upon retirement to provide selected beneficiaries with a life income equal to a fraction of his retired pay. According to the option selected, the widow(er), children, or both may have been selected as beneficiaries. The annuity provided through the RSFPP is not affected by any cost-of-living increase. The annuity is taxed as income to the beneficiary, but it is not subject to reduction on account of eligibility for

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[72] *Id.* With regard to monetary emoluments, the necessity of frequent reference to the most recent statutory reference or ***current*** tables is of utmost importance because some of these monetary emoluments are statutorily tied to the Consumer Price Index (CPI). *See, e.g.*, 10 U.S.C. §1401(a) (1970) (adjustment of retired pay and retainer pay to reflect changes in the CPI). Note that such a CPI-triggered increase may also increase other emoluments which are based upon the relevant amount. Consider, for example, the Survivor Benefit Plan (SBP). When cost-of-living increases are applied to retired pay, similar increases will automatically be passed on to annuities payable under the SBP. The necessity of statutory review is important even if the CPI trigger is not incorporated into the statutory scheme. Congress is well aware of the impact of inflation upon fixed benefits, and consequently, the quantitative amounts are periodically increased. Fortunately, the eligibility provisions and the procedural aspects of the programs are rarely altered.

[73] Some of the summary descriptions of the emoluments are excerpted from U.S. DEP'T OF ARMY, PAMPHLET NO. 608-4, FOR YOUR GUIDANCE—A GUIDE TO THE SURVIVORS OF DECEASED ARMY MEMBERS (1975) and from the Army Times Report, "Military Survivors' Checklist" prepared by The Army Times Publishing Co., Washington, D.C. 20024 (reprinted with their express permission). Statutory citations are given, but other references included at note 3 *supra*, are not repeated.

[74] *See* ***generally*** title 10, United States Code.

[75] 10 U.S.C. §§ 1475-1480 (1970).

[76] 10 U.S.C. §§ 1431-1446 (1970).

Veterans' Administration Dependency and Indemnity Compensation or Social Security survivor's benefits.

Survivor Benefit Plan (SBP).[77] The SBP provides an income to the beneficiary of each participating retiree, equal to 55 percent of a designated "base" amount (often equal to the entire amount of retired pay). The size of this annuity is adjusted regularly for increases in the cost of living. At age **62,** or at any age if the beneficiary ***could*** receive Social Security survivor benefits based on military service performed by the deceased after 1956, the amount of SBP annuity will be reduced by an amount equal to the amount of such Social Security benefit directly attributable to the deceased's military earnings record after 1956.

If a retiree dies as a result of a service connected disability, and thereby entitles his spouse to Dependency and Indemnity Compensation payments each month from the Veterans' Administration, the SBP annuity will be reduced by an amount equal to the amount of DIC payable, and the spouse will be compensated for the amount of SBP premiums paid by the retiree with the intention of providing the amount of the annuity that has been denied.

Only one annuity may be paid on behalf of any insured retiree. Therefore, naming of children as beneficiaries, with or without spouse, ensures only that each is considered a contingent beneficiary. No payment will be made to the retiree's estate should no eligible beneficiary survive him.

Servicemen who die on active duty while eligible for retirement by virtue of longevity are considered to be insured, without cost, to the extent which would be possible if they had retired immediately prior to death.

c. Unpaid Pay and Allowances. Final payment of all pay and allowances earned but not paid at the time of the member's death, including a settlement for all unused accrued leave, is made to certain enumerated or otherwise designated individuals.

2. Monetary Emoluments: Veterans' Administration.[78]

a. Dependency and Indemnity Compensation (DIC).[79] When a service member dies on active duty, his death will be considered "service connected" unless misconduct or negligence is proven. Service connected death qualifies the individual's spouse and children for a monthly payment which is computed on the basis of the member's rank at the date of death. An additional amount is

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[77] 10 U.S.C. §§ 1447-1455 (Supp. V, 1975). This description is extracted from the **Army** Times Military Survivors Checklist. ***See*** note 73 ***supra.***
[78] ***See generally*** title 38, United States Code.
[79] 38 U.S.C. §§ 401-423 (1970). ***See*** also 38 U.S.C. §§ 402-417 **(Supp.** V, 1975).

payable to a widow(er) who is a patient in a nursing home and may be payable to a widow(er) who is disabled. Regardless of eligibility or the existence of a surviving spouse, payments may be made to children during minority or until age 23 if registered as full-time students in a VA-approved educational institution, or indefinitely in certain cases if they are physically or mentally disabled. Payments are exempt from federal income taxation and are not subject to seizure by creditors of either the deceased member or the spouse. DIC may be received at the same time as social security benefits without reduction of either, but DIC will supplant a portion or all of the SBP annuity.

b. VA Pension.[80] If death occurs after separation from wartime service and is not due to a service-connected cause, a pension may be payable to the member's surviving spouse and children depending upon their annual income and net worth.

c. Government Insurance Programs.[81] The Veterans' Administration administers five separate insurance programs (U.S. Government Life Insurance,[82] National Service Life Insurance,[83] Veterans Special Term Insurance,[84] Service Disabled Veterans' Insurance,[85] and Veterans Reopened Insurance[86]), and supervises three programs (Servicemen's Group Life Insurance,[87] Veteran's Group Life Insurance,[88] and Veterans Mortgage Life Insurance[89]). The primary life insurance program in effect at the present time is SGLI which is available to all active duty members, certain reserve and retired reserve members, and to separated members for a period of 120 days. Coverage is available up to $20,000 and is payable to any named beneficiary or, if none is named, to statutorily designated beneficiaries. After separation, a member may convert his SGLI coverage to the five-year nonrenewable VGLI term policy. At the end of the five-year term, the veteran may allow his insurance to lapse or may exercise his right to convert his policy to a commercial whole life policy offered by a participating commerical insurance company.

3. *Monetary Emoluments: Social Security.*[90]

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[80] *Id.* §§ 501-562 (1970).
[81] *Id.* §§ 701-788 (1970).
[82] *Id.* §§ 740-760 (1970).
[83] *Id.* §§ 701-725 (1970).
[84] *Id.* § 723 (1970).
[85] *Id.* § 722 (1970).
[86] *Id.* § 725 (1970).
[87] *Id.* §§ 765-776 (1970).
[88] 38 U.S.C.A. § 777 (1976).
[89] 38 U.S.C. § 1815 (1970).
[90] ***See generally*** title **42,** United States Code.

Since 1957 military service has been covered employment for social security purposes. The social security benefits are in addition to other military emoluments except that such payments may offset the formula determined amounts payable to a survivor under the military Survivor Benefit Plan.

4. Monetary Emoluments: Related Emoluments or Considerations

a. Emergency Financial Assistance. The Army Relief Society may provide financial and educational assistance to dependent widows(ers) and children of deceased Regular Army personnel. Additionally, Army Emergency Relief may provide emergency financial relief to all Army members, active and retired, and their dependents.[91] AER assistance is ordinarily limited to items of basic maintenance and is provided only on a nonrecurring basis. Additionally, there is an AER Educational Loan Program available to, among others, children of deceased Army members.[92]

b. United States Savings Bonds. Many service members and retirees purchase savings bonds through monthly payroll deductions and leave them on deposit with the U.S. Treasury. Frequently survivors of such personnel forget or are unaware of the existence of the bonds, and an inquiry must be made to the Federal Reserve Bank or the U.S. Treasury.[93]

5. Miscellaneous Rights and Benefits

a. Civil Service Job Preference. Widows whose husbands die on active duty are entitled to a point preference on Federal Service Entrance Examination scores. Also eligible are the unremarried widows of honorably discharged veterans of wartime service or of service for which a campaign badge was issued.[94]

b. Continued Service Benefits and Privileges. Statutes and Army regulations extend many military benefits to the surviving spouse of a deceased service member. Most important among these

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[91] Army Reg. No. 930-1 (18 Oct. 1974). *See* generally Relief Agencies *For* Service Families, DIGS NO. 8A-55 (Rev. 1, 1975).

[92] See U.S. DEPT. OF ARMY, PAMPHLET NO. 930-1, ARMY EMERGENCY RELIEF EDUCATIONAL LOAN PROGRAM (1973).

[93] Over 700,000 unclaimed savings bonds with an estimated face value of $50 million are presently being held by the U.S. Treasury and Federal Reserve banks. Many of the bonds have been held longer than 30 years and institutional records indicate that a high percentage of them are owned by World War 11, Korea and Vietnam veterans, or their successors or co-owners. LAO's should ensure that their clients are not among the owners who have forgotten that they have bonds on deposit, and should ensure that, if appropriate, the clients' bonds are identified and listed among their assets. *See* generally HOUSE COMM. ON GOVERNMENT OPERATIONS, UNCLAIMED SAVINGS BONDS BELONGING TO VETERANS AND OTHERS, H.R. REP. NO. 1623, 93d Cong., 2d Sess. (1974).

[94] 5 U.S.C. § 3309 (1970).

benefits is continued eligibility for medical treatment in military medical facilities or through the CHAMPUS program.[95] Other financially important benefits include the ability to utilize military commissaries96 and post exchanges.[97]

c. Educational Assistance For Surviving Spouse and Children. A considerable number of educational assistance programs are available to the surviving spouse and children of deceased members and veterans. One such program is the War Orphans' and Widows' Educational Program.[98] Under this program the widow(er) and children of a serviceman or veteran who dies of a service-connected cause may be eligible for educational subsidies similar to those the GI Bill provides for veterans. Children generally must exercise their eligibility between the ages of 18 and 26, although exceptions may be made in certain circumstances. Monthly payments will be provided for up to 36 months.

d. Federal Tax Benefits. In addition to the income tax exemptions relating to Social Security and Veterans' Administration payments, income tax liability is canceled with regard to taxes owed by any service member who dies in a combat zone or from wounds, disease or injury incurred while so serving.[99] Additionally, federal estate tax provisions provide that military annuities are not included in the gross estate of a deceased member[100] and estate taxes may be significantly reduced for a service member who is killed in action while serving in a combat zone or who dies as a result of wounds, disease or injury incurred while serving in a combat zone.[101]

e. Payment of Expenses Incident to Death.[102] Certain of the expenses incident to the burial of a deceased service member may be assumed by the Government. Included in this category of expenses are those costs associated with care of the remains, interment and the presentation of a burial flag. The Veterans' Administration provides similar benefits on behalf of deceased veterans,[103] and also provides headstones or markers for veterans' graves.[104] Shipment of household goods and personal effects of deceased service

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[95] 10 U.S.C. § 1076 (1970); Army Reg. No. 40-121, para. 3-i (27 Aug. 1975); Army Reg. No. 606-5, paras. 41 & 45 (8 Mar. 1976).
[96] Army Reg. No. 31-200, app. A, 1. *f* (12 July 1974).
[97] Army Reg. No. 60-20, para. 3-8(5) (29 Aug. 1975).
[98] 38 U.S.C. §§ 1700-1766 (1970).
[99] INT. REV. CODE OF 1954, § 692.
[100] *Id.* § 2039(c)(4).
[101] *Id.* § 2201.
[102] 10 U.S.C. § 1481 (1970).
[103] 38 U.S.C. § 902 (1970).
[104] 38 U.S.C. § 906 (Supp. V, 1975).

personnel will be made at government expense and a relocation allowance will be paid to survivors.[105]

f. State Benefits: States frequently have parallel benefits for the survivors of military personnel. Such benefits may be in the form of tax exemptions, bonuses,[106] educational assistance, employment preferences, cemetery plots, and burial allowances. Specific reference must be made to the statutes of the appropriate state.

g. VA Home Loan Guarantees.[107] The unremarried surviving spouse may be eligible for GI loan benefits, including home loans, if the service member served on active duty during World War II or since 1950 and died in service or after separation as a result of a service connected disability.

This list demonstrates that there are many government emoluments which are of estate planning significance to the middle-income military member. Although there may be other aspects of military life which complicate the client's estate planning,[108] ordinarily the client needs estate planning counseling but does not require a complex estate plan.

As a result of the commonality of asset structure and the typically similar quantitative size of service families' estates, the nature of the estate planning tools either requested by or appropriate for the middle-income military member is limited. This is true despite the number and relative uniqueness of the many military emoluments. As noted by one writer, for example, middle-income families are rarely in a position to consider extensive gift planning and are ordinarily extremely reluctant to establish and fund irrevocable trusts.[109]

There has been a dual theme to this section: the estates of middle-income families are ordinarily of limited quantitative size and of similar asset structure; and the estates of middle-income military

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[105] 10 U.S.C. § 4712 (1970); Army Reg. No. 638-1, para. 2-9 (4 Sept. 1974).

[106] For a summary of state bonuses which may be payable to survivors of active duty members or veterans *see State Bonuses For Vietnam Veterans,* DIGS NO. 8A-10 (Rev. 8, 1976).

[107] See 38 U.S.C. §§ 1801-1827 (1970).

[108] Consider, for example, the implications of geographic mobility and periodic changes of assignment during the course of a military career. Frequently at the time of death the deceased military member may own real property in several jurisdictions and may have a considerable amount of his personal property located outside the domiciliary jurisdiction. Ascertaining the domicile of the decedent at the time of death may, in and of itself, be extremely difficult. The service member's domicile at the time of entry onto active duty is presumed to continue throughout his period of active service; however, service members can and do frequently change that domicile. *See generally* LEGAL ASSISTANCE HANDBOOK, *supra* note 1, at chapt. 24; Sanftner, *The Servicemember's Legal Residence: Some Practical Suggestions,* 26 JAG J. 87 (1971); Comment, *The Determination of Domicile,* 65 MIL L. REV. 133 (1974); *cf.* Note, *Domicile As Affected by Compulsion,* 13 U. PITT. L. REV. 697 (1972).

[109] Ruther, *Planning for the Medium-Sized, Modern Estate, 105 TRUSTS & EST. 11 (1966).*

clients are riddled with the complexities of governmental emoluments which possess estate planning significance. Estate planning services are needed, but usually are not inordinately complicated.

Although the military LAO is authorized to render such services and should be competent to provide them, all too often such services are not ***requested*** by the military client. The next section of this article will analyze the nature of the middle-income military client and attempt to delineate the reasons military personnel rarely request estate planning services.

V. THE NATURE OF THE MIDDLE-INCOME MILITARY CLIENT

Identifying and meeting the legal needs of middle-income families have long been ignored. A substantial number of empirical studies regarding the rendition of legal services to the poor was conducted after the Supreme Court decisions in ***Gideon*** *v. Wainwright*[110] and other cases,[111] and after the establishment of the Office of Economic Opportunity Legal Services Program in 1965.[112] One author has questioned the breadth of these studies, noting that they "answer few questions about [the] availability and use of legal services by other economic segments of the public. . . ."[113] One such "economic segment" is the middle-income family.

Although in recent years there has been increasing attention paid to the legal needs of these families[114] and a general re-examination of the systems used to deliver legal services, the rendition of legal services to middle-income families is still inadequate. Furthermore, it is unfair for the legal profession to passively await the formulation of client demand.

Middle-income families, and for reasons discussed below, particularly middle-income military families, frequently do not identify the existence of a legal problem. In any event, they frequently

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[110] 372 U.S. 335 (1963).

[111] Consider also the impact of the decisions in cases such as Argersinger v. Hamlin, 407 U.S. 25 (1972); ***In re*** Gault, 387 U.S. 1 (1967); and Miranda **v.** Arizona, 348 U.S. 436 (1966).

[112] Act of Aug. 29, 1964, Pub. L. No. 91-177, 83 Stat. 829.

[113] B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC 7 (1974).

[114] ***See, e.g.***, B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970); STOLZ, THE LEGAL NEEDS OF THE PUBLIC: A SURVEY ANALYSIS (1968); Brown, ***Legal Needs: Appropriate Use of Lawyers' Services,*** 4 U. TOLEDO L. REV. 353 (1973); Curran, ***Utilization of Lawyers' Services By The General Public,*** 36 UNAUTHORIZED PRACTICE NEWS 21 (1971).

do not perceive the need to retain legal counsel. To a large degree this is understandable.

It is illogical to assume that an individual can accurately define his legal needs. Middle-income people ordinarily have defined their needs in terms of crises or particular situations. Their identification of a legal need is ordinarily "keyed to a specific event or occurrence."[115] But even this is not enough.

> **[A]** "need" even when recognized is a matter of degree. In a technical sense, one never absolutely needs **a** lawyer. . . . Thus, the question is not one of ***necessity,*** but rather a question of ***advisability,*** or ***usefulness,*** or ***appropriateness.***[116]

The problem of defining "legal needs" and recognizing the advisability of obtaining legal counsel is particularly acute with regard to estate planning. Estate planning is largely prospective and anticipatory in nature. Properly considered, it is a form of preventive law and as such it is based upon "a whole scheme of legal services [which are] the antithesis of crisis."[117]

There are many other reasons why middle-income families do not properly plan their estates and do not obtain legal counseling for this purpose. As a broad proposition, many such families are unfamiliar with the retention and use of attorneys. Many middle-income families perceive estate planning as an unnecessary luxury or as only relevant to wealthy individuals. Relatedly, the middle income family may believe, as they are often advised,[118] that because a great majority of their assets are owned jointly, no further planning is necessary.[119]

Other reasons are far more subtle and are psychological in nature.[120] Many persons are reluctant to discuss or plan for death. Optimistically, the entire subject is without any taint of immediacy. Additionally, many persons are reluctant to reveal intimate financial and familial details to another person. Considerable indebtedness, lack of resources and assets, embarrassingly poor financial planning and investment experience,

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[115] Kram, ***Estate Planning: The Public's Perceptions and Attitudes, 8*** REAL PROP., PROB. & TR. J. 489, 492 (1973).

[116] Brown, ***Legal Needs: Appropriate Use of Lawyers' Services,*** 4 U. TOLEDO L. REV. 353, 354 (1973) (emphasis added).

[117] ***Id.*** at 355.

[118] ***See*** note 67 ***supra.***

[119] It should also be noted that the legal definitions of a decedent's gross estate for tax purposes and probate estate often do not comport with the individual's perception of his own wealth. Individuals with large insurance holdings, for example, may not realize that for estate and tax planning purposes they are quite wealthy.

[120] ***See*** Shaffer, ***Some Thoughts On The Psychology of Estate Planning,*** 113 TRUSTS & EST. 568 (1974).

and familial disunion or bitterness may all be exposed in the course of estate planning. Such disclosures may be awkward and distasteful.

Again, the middle-income individual is often at a relative disadvantage when compared to those accustomed to affluence. Although there have been a number of estate planning books written for lay readers in recent years,[121] ordinarily the wealthy individual has been better conditioned to and more fully prepared for the necessity of estate planning. He frequently is more familiar with and at ease in discussing personal matters with an attorney.

Although "these defensive psychological elements"[122] cannot be measured quantitatively or described precisely, they do exist and must be perceived as reasons why many families do not wish to thoroughly consider estate planning and do not wish to seek legal counseling.

There are at least three other reasons underlying limited client demand which should be noted. The individual may be unaware of the specific estate planning tools which are available to him or he may feel that tax and estate planning work can be done as well by nonlawyers.[123] Furthermore, he may fear prohibitive legal costs in obtaining such services from an attorney. These considerations may be significant to most middle-income families, but there is a far more significant element which applies to middle-income military families. This factor is the false sense of security which results from continued access to the benefits extended to active duty personnel and may be denominated the "military security syndrome."

As previously discussed, there is a multitude of military or military-related emoluments which are available to the military member, his family, and his survivors. During the course of his military career, the member and his family are provided with a secure income flow; health, disability and insurance protection; housing, travel, relocation, and subsistence allowances; and recreation and shopping facilities, to name the most important. These emoluments help engender a sense of community among military members and lead to the notion that the military "takes care of its own."

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[121] ***See, e.g.***, B. BROSTERMAN, THE COMPLETE ESTATE PLANNING GUIDE (1975); DACY, HOW TO AVOID PROBATE (1965); DUNN, 36 **WAYS** TO AVOID PROBATE AND REDUCE ESTATE TAXES — A LAYMAN'S GUIDE TO ESTATE PLANNING (1967); H. HARRIS, FAMILY ESTATE PLANNING GUIDE (1971).

[122] Kram, ***Estate Planning: The Public's Perceptions and Attitudes,*** 8 REAL PROP.. PROB. & TR. J. 489 (1973).

[123] ***See generally*** B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC (1974).

To a large degree, the reliance of the military member is justified while he is on active duty. However, after separation or discharge many of these emoluments and protections cease or are further qualified. Because of the strength of the military community in the short run, the military member inadequately plans for the relatively long post-retirement period.[124]

VI. THE ROLE OF THE MILITARY LEGAL ASSISTANCE OFFICER

One of the ongoing responsibilities of all attorneys and of the organized bar is to continue to improve the delivery of legal services to all segments of the public. During the past 15 years particular attention has been paid to increasing the availability and use of legal services by the poor. This focus of attention has largely resulted from a line of major Supreme Court decisions[125] and the establishment of the OEO Legal Services Program.[126] Although the task of implementing an efficient legal services program for the poor is far from accomplished, the analysis of legal delivery systems has broadened, and, to a degree, there has been a shift of attention. Recently, increasing attention has been paid to defining and meeting the legal needs of ***both*** poor and middle-income families.

> There has been of late a great deal of discussion and not a little controversy within the [legal] profession about such matters as free legal service programs, prepaid legal expense insurance, group legal services, lawyer referral services and use of paraprofessionals. Each of these is essentially a plan for making some adjustment in present arrangements for distributing and delivering lawyers' services. And, proponents claim that these plans will make legal services more readily available to ***all*** segments of the general public. The underlying assumption is that there is a substantial number of people deprived of legal services under the present distribution system.[127]

This article has focused upon two narrow aspects of the broad

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[124] It is interesting to note that the average age at retirement for an officer in the Armed Forces is 47.2 years and for an enlisted member is 42.5 years. This is significantly ***earlier*** than most persons retire within the civilian community. S. REP. NO. 92-1089, 92d Cong., 2d Sess. (1972). ***See also*** U.S. CODE CONG. & AD. NEWS 3292 (1973).

[125] ***See*** notes 110-111 ***supra.***

[126] ***See*** text accompanying notes 110-111 ***supra.***

[127] Curran, ***Utilization of Lawyers' Services By The General Public,*** 36 UNAUTHORIZED PRACTICE NEWS 21 (1971) (emphasis added); ***accord, The Organized Bar: Self-serving or Serving The Public, 60*** A.B.A.J. 443 (1974). This latter article ***points out that many proposed changes in the methods of the delivery of legal services all are based upon the premise that there are many persons with a need and demand for legal services who have a perceived or actual inability to obtain them, Id.*** at 437-38.

problem of organizing and implementing effective legal delivery systems. It has sought to define the potential and proper role of the military LAO in rendering estate planning services to eligible members of the military community. Thus it has dealt with one type of legal service and one category of clients.[128]

Historically, the services offered by the military LAO have been restricted to general office counseling, limited legal drafting, and client referral.[129] Despite the fact that since 1974 the LAO has been authorized to "perform all professional functions short of actual court appearance," he has frequently defined his role narrowly. This is particularly true with regard to the rendition of estate planning services.

In the immediately preceding section the problem of limited client demand was analyzed. It was suggested that for a multitude of reasons clients often do not request estate planning services. There is regrettablyan opposite side to this problem—the problem of attorney reluctance. For many reasons military LAO's, like many general practitioners, are extremely reluctant to enter into the field of estate planning. The client does not ask and the attorney does not offer.[130] A service, such as the preparation of a will, is provided, but it is too often a limited service in which the attorney only renders the service of a scrivener.

In part this results from the considerable overemphasis in both legal training and legal commentary upon tax considerations and complex estate planning techniques.

> No general practitioner can possibly keep up with myriad plans which are proposed each month by estate planning institutes, bar associations seminars, insurance companies, banks and trust companies and law book publishers. Most of the literature circulated today places great emphasis on

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[128] The article has been further narrowed in two respects. Paralleling the civilian community, in the late 1960's and early 1970's the Department of Defense spent considerable time and effort attempting to extend and improve the legal services available to low-income service members and their dependents. For many reasons which are summarized above, ***see*** text accompanying notes 30-46 ***supra,*** the Expanded Legal Assistance Program was and is of limited significance within the military community. For this reason and because persons eligible for that program, ordinarily only military personnel in the grade of E-4 or below and their dependents, have extremely limited estate planning needs, this article has been limited to the role of the military LAO under the traditional legal assistance program. Additionally, the article has been limited to the role of the Army JAG officer serving in the capacity of a LAO under the traditional program. ***See*** note 3 ***supra.***

[129] ***See*** text accompanying notes 10-23 ***supra.***

[130] Unquestionably some clients do desire and expect the attorney to assume an educative and counseling role and resent the fact that the attorney merely "elicit[ed] only the information that was necessary seemingly to 'fill in the blanks'." Kram, ***Estate Planning: The Public's Perceptions and Attitudes,*** *8* REAL PROP., PROB. & TR. J. 489, 492 (1973).

> tax savings....Some voices wisely have questioned that approach—especially for the client of moderate means. [Is the legal profession] educating or confusing lawyers, especially general practitioners, right out of their potential market?[131]

The question of "potential market" aside, the overemphasis has caused many attorneys to question their capacity to competently resolve even the most limited estate planning requests. Relatedly and more importantly, the putative complexities have tacitly encouraged the attorney to avoid estate planning discussions and instead adopt the role of a scrivener.

Consider the role of the attorney in the preparation of a will.[132]

> Most wills that fail to meet the needs of the testator do so because the draftsman has merely filled the role of a scrivener. He has listened to what the client has said and then, with little more, has committed it to paper. . . [but] the attorney must not only be skillful in the art of writing, he must also fill the role of an educator, a detective and a logician.[133]

This educator-detective-logician role sets a standard for the military LAO in the rendition of legal services to a client with regard to the client's estate planning needs—lifetime, dispositive, survivors', or post-mortem.

For the reasons analyzed in the previous section, few people specifically request estate planning services. Ordinarily the request for legal services, such as the will preparation example, will be specific and narrow in scope. Thus, it is incumbent upon the attorney to broaden the service from the form will to the estate planning discussion.[134]

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[131] Gerhart, ***A New Look at Estate Planning: The General Practitioner and Mr. Average, 50*** A.B.A.J. **1043 (1964).**

[132] The use of the will preparation as an example seems particularly justified because of military command emphasis placed upon the necessity of each service member to have a will, and, consequently, the substantial number of wills requested of and prepared by military LAO's. Additionally, the will is one of the primary documents in most individual's estate plan. Despite the ever-increasing use of certain will substitutes as a means of transferring wealth upon one's death, the will does remain the cornerstone of many individual's estate plan. Equally important, when an individual has a will prepared, he is typically the most receptive to considering and systematically planning his estate.

Obviously a will can be drafted without legal counsel; however, in a great majority of cases people do seek assistance. One study indicated that of persons having a will, **86.4%** had "someone else" prepare it and **84.7%** of those persons had made some use of a lawyer in connection with the preparation of their will. Not surprisingly, "lawyers loom relatively large as participants in the will-making process." B. **CURRAN & F. SPALDING,** THE LEGAL NEEDS OF THE **PUBLIC 75 (1974).**

[133] Weinberger, ***The Multiple Roles of the Draftsman, in*** PRACTICAL **WILL** DRAFTING **103 (1974).**

[134] Examples of other specific events which may indicate a need for estate planning counseling and services include the purchase or sale of residential or other real estate; the purchase of life insurance; an inquiry regarding income, estate, or inheritance taxation; retirement or separation from active duty; or a question concern-

It is impossible to list all the subjects which may arise in the course of estate planning counseling, and it is impossible to define the exact boundaries of the attorney's responsibilities with regard to a specific client. Nevertheless, it is suggested that the subjects listed below are examples of estate planning considerations which the military LAO should be prepared to explain and discuss with a middle-income military client. It is stressed again that the appropriateness and depth of any such discussion will vary with each client. Nonetheless, it is reiterated that many clients need assistance and the military **LAO** is often competent and should solicit information and advise the client with respect to the following subjects:

1. The nature, meaning, and importance of estate planning.
2. The advisability of spousal and familial participation in one's estate planning.
3. The existence, location and approximate current value of one's assets.
4. The existence and nature of one's debts and liabilities and the alternatives and procedures for their elimination.
5. The clarification and articulation of the testator's estate planning goals and desires.
6. The distinction between testate and intestate distribution and general summarization of the state laws of descent and distribution, disinheritance, and rights of election.
7. The meaning and significance of probate and taxable estates and the availability of charitable and marital deductions and the specific exemption.
8. The methods of achieving flexibility in the distribution and use of one's wealth and the income therefrom.
9. The alternatives relating to the realignment or retitling of property holdings and the possible uses of gifts, trusts, and powers of appointment.
10. The methods of avoiding family disunion by altering or adjusting one's dispositive scheme.
11. The importance of assuring estate liquidity in order to meet the immediate cash demands of the estate and dependent survivors, thereby avoiding the forced sale of estate or private assets.
12. The advantages and disadvantages of various life in-

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ing a government insurance or annuity plan. *See generally* Conghlin, *HOW To Force A Client To Do Something About His Estate Plan: To Start: Give Him Information,* 1 EST. PLANNING 152 (1974); Weinberger, *The Multiple Roles of the Draftsman, in* PRACTICAL WILL DRAFTING (1974).

surance alternatives.

13. The availability and extent of military and military-related emoluments to the member and his survivors, and the procedures regarding the application for and receipt of such emoluments.

14. The significance of cautious appointment of executors and guardians, and, relatedly, the basic responsibilities of each.

15. The necessity of periodic review of one's wealth and one's estate plan.

This list does not purport to be exhaustive, but it does evidence the broad spectrum of estate planning considerations and services which the military LAO should be prepared to discuss with a client who, directly or indirectly seeks estate planning services.

In a sense, the military LAO must walk a thin line when dealing with estate planning matters. He must be able to assist the client in understanding the meaning and methods of estates planning, and he should be prepared to render appropriate counseling and drafting services. On the other hand, and equally important, where appropriate, he must identify those clients who need to obtain the services of an estate planning specialist, and he should recommend they seek the assistance of such an individual.

It has been the thrust of this article that such services are not presently being provided adequately, despite the fact that the existing military legal assistance program facilitates the opportunity for military attorneys to render these services to members of the military community. During the formative years of the traditional legal assistance program only limited office counseling and legal drafting were provided, but for a number of reasons this practice may now and should now be changed.

The regulation authorizes considerable counseling and drafting. The military **LAO** has access to many articles and publications which will assist him in rendering estate planning services. Because of the multitude of military and military-related emoluments, the LAO may, in some ways, be more competent than a civilian practitioner in rendering estate planning services to middle-income military members and dependents.

Hopefully, even despite the probable continuing reluctance of middle-income families to seek estate planning services, the military LAO will recognize his competence and overcome the implications of present day estate planning literature. He should take the opportunity to render more complete services through the traditional legal assistance program to members of the military community.

ADMINISTRATIVE DUE PROCESS REQUIREMENTS IN THE REVOCATION OF ON-POST PRIVILEGES*

Major J. Neill Wilkerson**

I. INTRODUCTION

The revocation of some on-post privileges[1] by the installation[2] commander[3] involves important interests of individuals which, under recent court decisions, may be protected by the due process clause of the fifth amendment to the United States Constitution.[4] The status of these interests may require that certain procedural safeguards be afforded the beneficiary of post services before his ability to obtain such services may be affected. In light of recent federal court decisions dealing with procedural due process, and the large number of legal suits filed against the Army and its ex-

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[1] The term "privileges" is used throughout this article to include all benefits extended to persons, whether by entitlement or ***gratis*** and whether they are denominated "right," "benefit" or "privilege." While "privilege" includes all benefits, this article will deal specifically with only those perquisites delineated in the text immediately preceding footnote 11. The various terms are used interchangeably at times. Because this article is primarily concerned with suspension and termination of already vested benefits, discussion of the eligibility requirements for such benefits is beyond the scope of this article.

[2] The term "installation" is defined in Army Reg. No. 210-10, para. 1-3 (27 Aug. 1975) [hereinafter cited as AR 210-10], and includes depots, arsenals, ammunition plants, hospitals, forts, camps and stations. *See also* Army Reg. No. 310-25, para. 9 (15 Sept. 1975) [hereinafter cited as AR 310-25].

[3] The commander of an installation is generally the senior, regularly assigned officer on the installation, unless he is ineligible. *See* Army Reg. No. 600-20, para. 3-1 (30 May 1975) [hereinafter cited as AR 600-20]. This is not always the case, but in this article the concern is always with the installation commander, whomever he may be. When the term "commander" is used, it refers to the installation commander as opposed to a troop commander.

[4] "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . " U.S. CONST. amend. V.

ecutives at every level,[5] it is appropriate to reevaluate the present regulatory procedures[6] employed by a commander when he seeks to suspend or revoke various privileges accorded persons visiting, working or residing on a military reservation.

A commander has broad authority[7] to revoke or otherwise diminish on-post privileges of servicemen[8] and their dependents for misconduct or abuse of the particular privilege. This extensive authority flows from the post commander's responsibility to administer the military installation.[9] This authority is in many respects comparable to the police powers exercised by state and local governments.

The purpose of this article is to establish a methodology for evaluating revocation procedures. This scheme will assist the judge advocate[10] in protecting the commander from inadvertently

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[5] Telephone conversation with Colonel William H. Neinast, Chief, Litigation Division, Office of The Judge Advocate General of the Army, April 8, 1975. The Army has been involved in some 4,426 cases in civilian courts between January 1970 and December 1974. The Army's Litigation Division has expanded from 14 to 24 attorneys in an effort to handle this caseload. This expansion was necessary despite the assistance given by attorneys serving in the United States Department of Justice.

[6] The procedures in use vary greatly. For example, Army Reg. No. 28-1 (27 Aug. 1975) [hereinafter cited as AR 28-1], which governs recreation benefits, requires only summary procedures. *Id.* at para. 1-6*c*. Army Reg. No. 210-7 (11 Feb. 1970) [hereinafter cited as AR 210-7], governing on-post commercial solicitation exemplifies more complete hearing requirements. *Id.* at para. 5.

[7] For a general discussion of the sources of power and the authority of the installation commander ***see*** U.S. DEP'T OF ARMY, PAMPHLET NO. 27-21, MILITARY ADMINISTRATIVE LAW, at 6-109 (1973); Oliver, The Administration of Military Installations: Some Aspects of the Commander's Regulatory Authority With Regard to the Conduct and Property of Civilian and Military Personnel, at 10-19 (1958), unpublished thesis presented to and on file at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

[8] "Servicemen" will be used in its generic sense referring to male and female service personnel as well as to retired personnel of both sexes. An examination of the regulations indicates a frequent distinction between the entitlements of retired personnel as opposed to those of active duty personnel and their dependents. Those differences are not of great import in this article as the issue discussed deals with the restriction or complete revocation of privileges that are already being enjoyed or are otherwise already vested in the beneficiary.

[9] ***See*** *generally* AR 600-20 & AR 210-10 which indicate the wide range of the commander's duties. Those responsibilities include supervising medical care, disposing of abandoned property, maintaining order, investigating crimes, and training of troops for combat to name just a few. AR 210-10 is a good starting point for further inquiry into the duties and responsibilities of the commander. ***See*** *also* authorities cited in note 7 *supra*.

[10] When addressing installation management problems, the concern is with the installation commander as opposed to the troop commander because it is the installation commander who is given the duty of handling the post's problems. ***See*** notes 3, *i* & 9 *supra*. His legal advisor is designated his "staff judge advocate" if the commander is empowered to convene general courts-martial; "post judge advocate" will hereinafter be used while recognizing that the term "staff judge advocate" may be appropriate in some cases.

violating the limitations imposed on him by the due process clause of the fifth amendment. Furnishing this protection as part of his preventive law program, the judge advocate may help reduce potential sources of litigation against his commander.

This article will examine the concept of due process, by considering first, how to determine if a privilege or right is protected by the constitutional guarantee, and if so protected, how to ascertain what procedures are necessary to comply with the Constitution. A capsulated discussion of the various judicially recognized due process elements or safeguards will be followed by a demonstration of how the opposing interests of the Government and the individual are balanced to determine the proper mix of safeguards in a given case.

The myriad of rights, benefits, and privileges that fall under the commander's supervision precludes individual treatment of each. Only the most frequently involved privileges will be addressed in this article, but the methodology proposed is equally applicable with respect to other on-post benefits. The areas specifically covered are the post driving privilege, the post housing privilege, the commissary and post exchange shopping privileges, and a consolidated category which for convenience is denominated the "recreational/entertainment" privilege." Finally, recommendations are made to correct noted due process deficiencies in the current regulations.

11. DUE PROCESS IN THE CIVILIAN SECTOR

The fifth amendment to the United States Constitution provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[12] By the terms of the clause, only life, liberty and property interests are protected. Prior to taking any action which will deprive a person of one of the protected interests, the federal government[13] must afford the party concerned certain procedural safeguards[14] before the adverse action may be deemed

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[11] *See* Section III.F. *infra* for examples of such programs.

[12] U.S. CONST. amend. V.

[13] The fifth amendment protects citizens from deprivations by the federal government; the fourteenth, from state action. Because the commander is an agent of the federal government, the fifth amendment applies to his actions. Still, court decisions under the due process clause of the fourteenth amendment are equally instructive in the area because the clauses are identical in pertinent part. Thus, the Supreme Court opinions regarding due process requirements imposed on state actions must be studied also, especially in those cases dealing with activities analogous to federal actions.

[14] Notice of the proposed action and an opportunity to rebut adverse evidence are examples of such safeguards. ***See*** Section II.B. *infra* for discussion of the elements of due process.

constitutionally permissible. Examination of the clause indicates that there are two issues that must be resolved in situations involving governmental action against an individual. First, it must be determined whether or not the individual's interest is one that is protected: whether it falls within the ambit of life, liberty, or property. If not, the fifth amendment's requirement of due process is not applicable, although the regulatory process may prescribe certain procedures. If the interest in question is constitutionally protected, then the issue becomes what type procedures and procedural safeguards are required to meet the constitutional limitations.[15]

The succinct characterization of due process by the second Justice Harlan as "fundamental fairness"[16] is a starting point in any discussion of due process. The concept is of ancient origin;[17] still in the words of Mr. Justice Frankfurter, it is "the least confined to history and the most absorptive of powerful social standards of a progressive society."[18] That opinion is indicative of the great flexibility which characterizes due process. That flexible quality was emphasized by the Court in Cafeteria & Restaurant Workers Union *v. McElroy*:[19]

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.
>
> Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.[20]

Mr. Justice Cardozo stated that the very essence of due process is "protection from arbitrary actions."[21] But, even though there is no fixed definition of what constitutes due process, the courts are continually called upon to delineate when due process requires the imposition of procedural safeguards to avoid arbitrary action. Courts first must determine the precise nature of the interests of both the Government and of the individual.22 Then the court weighs the con-

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[15] *See* Goss v. Lopez, 419 U.S. 565 (1975); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).
[16] Duncan v. Louisiana, 391 U.S. 145, 186-87 (1968) (Harlan, J., dissenting).
[17] There is evidence of the concept recorded in the Book of St. John in the Bible. A group of Pharisees gathered and plotted to have Jesus of Nazareth arrested based on their rumor-engendered fear of him. Nicodemus, one of that group of rulers, chastised them saying, "According to our law we cannot condemn a man before hearing him and finding out what he has done." *St.* John 7:51 (Good News for Modern Man, The New Testament in Today's English Version, 2d ed. 1973).
[18] Griffin v. Illinois, 331 U.S. 12, 20 (1956) (Frankfurter, J., concurring).
[19] 367 U.S. 886 (1961).
[20] *Id.* at 895, citing Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (1931).
[21] Ohio Bell Tel. Co. v. Pub. Util. Comm'n, 301 U.S. 292 (1937).
[22] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 893 (1951).

flicting interests against each other. It is this balancing of governmental interests against those of the individual that is critical[23] and results in the determination of what safeguards or elements of due process are required in a given case. Thus a four step process is used by courts to resolve challenges to governmental action; they consider

1. What interests are protected by due process;
2. How is the protection achieved;
3. What part does the governmental interest play; and
4. By what means are the resultant safeguards determined for each case?

A. WHAT INTERESTS ARE PROTECTED BY DUE PROCESS?

When dealing with the interests that are protected by the Constitution, the due process clause speaks of "life," "liberty" and "property."[24] Thus when seeking to ascertain what constitutional requirements, if any, are mandated in a given case, the first issue to be resolved is whether the individual's interest falls within the scope of life, liberty or property.

1. Distinction Between "Right" and "Privilege"

The argument that the deprivation of a mere privilege by governmental action does not warrant the protection of due process is supported by several Supreme Court decisions.

In *Oceanic Navigation Co. v. Stranahan*,[25] the Supreme Court upheld a decision that no notice or hearing[26] was required before a $100 fine could be imposed on a ship. A medical examiner acting as an agent of the Secretary of Commerce had determined that an alien with a "loathsome or dangerously contagious disease'' had been brought to American shores on the ship. The medical examiner's determination that the alien was suffering from the disease at the time of embarkation was conclusive and the fine was enforced by denying the ship clearance to leave port until the fine was paid. The Court pointed out that Congress had absolute power over the right to bring aliens into the country and that the shipping company had a *mereprivilege* to enter U.S. ports. Due process was said not to apply to the deprivation of this privilege.

In *Bailey v. Richardson*,[27] the Supreme Court affirmed a lower

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[23] *Id.*
[24] U.S. CONST. amend. V.
[25] 214 U.S. 320 (1909) (affirmed by an equally divided Court).
[26] Notice and hearing are touchstones of due process.
[27] 341 U.S. 918 (1951).

court decision[28] which declared that government employment is neither "property" nor "liberty," but a privilege and consequently that the due process clause did not apply.[29] It is significant that the employee involved was neither recently hired nor serving a trial or probationary term of employment, but rather an employee with a definite status and certain rights.[30]

Soon after Bailey, however, the distinction between "rights" and "privileges" as a controlling factor in the application of due process protections began to lose favor with the Court. By 1956, the Court had begun to reverse lower court holdings which turned upon the distinction.31 Then in 1971, in the case of Bell *v. Burson*[32] the Court expressed the view that a state was limited by due process considerations when revoking a driving license, whether the license be denominated a "right" or a "privilege."[33] One year later, in Morrissey *v. Brewer*[34] the Court held that the customary characterization of parole as a privilege was no longer dispositive of a due process issue.[35]

In the same term Mr. Justice Stewart, writing for the Court in Board *of* Regents *v. Roth*,[36] delivered the eulogy for the weakened concept, stating:

> . . . [T]he Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.[37]

That pronouncement has been reaffirmed in numerous subsequent decisions38 and it may now safely be said that the labeling of a benefit as a "right" or as a "privilege" has no effect upon whether

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[28] Bailey v. Richardson, 182 F.2d **46** (D.C. Cir. 1950).
[29] *Id.* at 57.
[30] *Id.* at 55.
[31] *E.g.*, Slochower v. Board of Education, 350 U.S. 551 (1956). This case involved a tenured college instructor who was dismissed after having refused to answer questions before a congressional committee. New York City officials had known the answers to the questions for twelve years, yet they invoked provisions of the municipal charter requiring discharge of anyone who refused to answer questions relating to his official duties. No notice or hearing was given and the Court held that in Professor Slochower's case, such action violated the due process clause of the fourteenth amendment.
[32] 402 U.S. 535 (1971).
[33] *Id.* at 539.
[34] 408 U.S. 471 (1972).
[35] *Id.* at 481.
[36] 408 U.S. 564 (1972). This case involved a claimed property right in continued employment by a state university. ***See*** text accompanying note 47 *infra* for fuller discussion.
[37] 408 U.S. at 571
[38] ***See, e.g.***, *Goss* v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974).

the interest is protected under the due process clause. The real issue is whether the particular benefit under the particular circumstances, is a protected liberty or property interest.[39] Because administrative proceedings are incapable of affecting interests in "life," this article will limit its use of the term "protected interests" to liberty or property interests.

The courts have described "liberty" and "property" as "broad and majestic."[40] In *Board of Regents v. Roth*, the Court adopted Justice Frankfurter's earlier explanation of why the drafters of the Constitution utilized such imprecise terms as "liberty," "property" and "due process." In Justice Frankfurter's view, those words were

> . . . purposefully left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded the Nation knew too well that only a stagnant society remains unchanged.[41]

2. *Protected Property Interests*

Courts have recognized that "property" is not a fixed or narrow concept and that the interests subsumed by the term are not restricted to the ownership of land, structures, money and other chattels.[42] Thus, contractual rights, including implied contractual rights, are protected interests;[43] as is the receipt of welfare payments absent a change of status;[44] and in some cases the right to continued employment.[45] Even an inmate has a recognized, protected property interest in retaining his good behavior credits.[46]

Mr. Justice Stewart, speaking for the Court in *Board of Regents v. Roth*, summarized the recent "property" holdings and set out guidelines for lower courts to use to determine whether a benefit should be considered a protected property interest.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

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[39] To date, no court has identified a particular interest as stemming from the "life" language in the fifth amendment.
[40] Board of Regents v. Roth, 408 U.S. 564, 571 (1972).
[41] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949)(Frankfurter, J., dissenting).
[42] Board of Regents v. Roth, 408 U.S. 564, 572 (1972).
[43] Perry v. Sindermann, 408 U.S. 593 (1972)(college instructor's claimed interest in future employment). ***See*** text accompanying note 49 *infra*.
[44] Goldberg v. Kelly, 397 U.S. 254 (1970). ***See*** Section II.D. *infra* for a discussion utilizing *Goldberg* to develop a methodology for discerning minimal due process requirements.
[45] Slochower v. Board of Education, 350 U.S. 551 (1956).
[46] Wolff v. McDonnell, 418 U.S. 539 (1974).

> Property interests of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[47]

These guidelines were applied to Roth's claimed property interest in reemployment. Mr. Roth was a nontenured state college teacher who had been hired for one year, but was not rehired at the end of that term. The Court declared that the absence of a contractual guarantee of reemployment was not conclusive of the issue of whether he had a protected property interest.[48] The Court found no state statutes, university rules or policies that would have created a legitimate claim to reemployment. Under those circumstances, the Court concluded that even though most one-year, untenured instructors were rehired, Roth had no protected property interest in continued employment.

In a companion case, *Perry v. Sindermann*,[49] the Court held that even without a formal contract or tenure, a college instructor could establish a property interest in continued employment if he could demonstrate that rules and understandings fostered and promulgated by state college officials created such an interest.

In *Arnett v. Kennedy*,[50] a federal civil service employee attacked the process by which the Government dismissed him. Arnett claimed a protected property interest based on the Lloyd-LaFollette Act[51] which provided that Civil Service employees would be protected from dismissal except for "such cause as will promote the efficiency of the service."[52] The statute also provided procedures through which the Government would determine that a dismissal met the statutory requirement. The court refused to allow Arnett to attack the procedural portion of the legislation while claiming a benefit under another part of the same statute. Thus, although the benefit claimed had an independent source as required, the same source provided the means for taking that benefit away. A corollary to that holding is that the Government or its agencies may limit the procedures by which a newly created interest will be diminished in the future by including the desired procedures in the generative legislation.

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[47] 408 U.S. at 577.
[48] *Id.* at 378.
[49] 408 *C.S.* 593 (1972).
[50] 416 U.S. 134 (1974).
[51] 5 U.S.C. § 7301 *et seq.* (1970)
[52] 5 U.S.C. § 7501(a) (1970).

3. *Protected Liberty Interests*

Just as "property" has been interpreted to encompass broad personal interests, the concept of "liberty" has been broadly defined. Certainly, the concept is not limited to incarceration and other physical restraint;[53] in a free society, such a term connotes much more. The courts have declared that the concept of liberty includes the right to travel,[54] the freedom to "marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men."[55] Several recent judicial pronouncements deal with liberty interests more relevant to the subject matter of this article.

Norma Constantineau, a citizen of the State of Wisconsin, asserted a protected liberty interest when she challenged a state statute[56] that permitted the posting of names of "excessive drinkers" in all public retail liquor outlets in her home town. The Supreme Court, in *Wisconsin v. Constantineau*[57] recognized that such posting subjected named persons to public humiliation, embarrassment and scorn. The Court thus declared that

> . . . where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential.[58]

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[53] Board of Regents v. Roth, 408 U.S. 564, 572 (1972); Morrissey v. Brewer, 408 U.S. 471, 482 (1972). *See also* Young, *Due Process in Military Probation Revocation: Has Morrissey Joined the Service?*, 65 MIL. L. REV. 1 (1974).

[54] Kent v. Dulles, 357 U.S. 116 (1958).

[55] Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The age of this case has not impaired its viability as the Supreme Court cited this holding favorably in Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

[56] The statute, WIS. STAT. § 176.26(1) (1967) states in pertinent part:

> When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as to expose himself or family to want, or to the town, city, village or county to which he belongs to liability for the support of himself or family, or *so* as thereby to injure his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors or fermented malt beverages, become dangerous to the peace of any community, . . . [a designated class of individuals] may, in writing signed by her, him, or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such person may resort for the same. A copy of said writing so signed shall be personally served upon the person so intended to be prohibited from obtaining any such liquor or beverage.

The statute apparently anticipated that a unilateral determination and notification of that determination were sufficient procedures.

[57] 400 U.S. 433 (1971).

[58] *Id.* at 437. *But cf.* Bishop v. Wood, 423 U.S. 890 (1976) (mere discharge of public employee without a hearing or communication of reasons for discharge prior to pretrial discovery does not support a claim that discharged employee's "good name" was impaired); Paul v. Davie, 424 U.S. 693 (1976) (asserted damage to reputation does not implicate any constitutionally protected interest in § 1983 action by one who was unilaterally determined to be an "active shoplifter").

The basis for these due process requirements, it appears, was the protected liberty interest of the appellant.[59]

In *Roth,* the Court specifically addressed the property interest in employment and also noted its concern with a potential infringement of Roth's liberty interest. That interest would be involved if the state had, in refusing to rehire Roth, imposed any "stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities,"[60] an issue not alleged in *Roth.*

Protected liberty interests have also been used as an alternative basis for imposing due process requirements upon school administrators when they suspend students from school for up to ten days. In Goss *v. Lopez,*[61] the Supreme Court discussed both property and liberty interests. The property interest stemmed from an Ohio statute[62] which provided for a free education for all children between the ages of six and twenty-one. Another section of the Ohio statute empowered the school principal to expel or suspend a student for up to ten days for misconduct.[63] The Court found a possibility of serious damage to the student's relationship with his peers and his teachers growing out of possibly wrongful charges of misconduct. This, coupled with the potential future interference with opportunities for higher education and employment, represented an injury to liberty interests that, in the minds of five of the nine justices, warranted protection.[64] Due process in such a situation required giving oral or written notice of the charges of misconduct to the student. If the student denied the charges, he then had to be given an explanation of the evidence against him and an opportunity to present his side of the story.[65]

The determination that a particular interest is protected by the due process clause is only the first step in a court's analysis of a given situation. Once this determination has been made the court

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[59] While the Court's opinion did not explicitly delineate the basis of its holding. Board of Regents v. Roth, 408 U.S. 564, 573 (1973), more recently in *Goss* v. Lopez, 419 US. 565 (1975), the Court specifically cited *Constantineau* as involving depreciation of a protected liberty interest.

[60] Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

[61] 419 U.S 565 (1975).

[62] OHIO REV. CODE § 3313.64 (1972).

[63] OHIO REV. CODE § 3313.66 (1972). The statute required notification of the parents within 24 hours of the action of the reason for the action. However, there was no appeal available other than through the state judicial system.

[64] 419 U.S. at 575. Evidence was submitted that several of the Ohio state colleges requested information on school suspensions from every applicant for entrance. It was also claimed that some employers sought the same information, but their access to such records is limited by federal legislation, at least at those schools receiving federal funds. **See** Act of Aug. 21, 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484.

[65] 419 U.S. at 581.

must tailor the nature and extent of the procedural safeguards of notice and hearing to the facts of the particular case.

B. HOW PROTECTION IS ACHIEVED— THE ELEMENTS OF DUE PROCESS

In order for a procedure to comply with the requirements of procedural due process, certain safeguards must be afforded an individual before his interests may be adversely affected. The precise dimensions of these safeguards vary with individual circumstances, but due process requires, at a minimum, notice and a hearing. The first of these requirements, notice, is relatively straightforward; and the second, a hearing, has as many variants as there are factual situations.

1. Notice

The purpose of notice is to apprise the individual concerned of the pending action and of the evidence against him in order that he might adequately prepare to rebut that evidence.[66] The notice of the pending action must be adequate both as to time and detail;[67] and may be in oral or written form[68] as indicated by the circumstances of the case.[69] Whichever form is used, it must set out the complete evidence that will be considered against the person, for if he is to effectively counter or attempt to counter the adverse material he must first know what that evidence is.[70]

2. *Opportunity to Rebut Evidence*

The respondent has a right to be heard at a meaningful time and in a meaningful manner. That meaningful manner of presentation is determined by the issues to be resolved and by the "capacities and circumstances of those who are heard."[71] As a general rule, if there are factual issues to be resolved or if factual issues are in-

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[66] Escalera v. Housing Authority, 425 F.2d 853 (2d Cir. 1970), *cert. denied,* 400 U.S. 853 (1971).

[67] Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Escalera v. Housing Authority, 425 F.2d 853, 862 (1970), *cert. denied,* 400 U.S. 853 (1971).

[68] Goss v. Lopez, 419 U.S. 365, 581 (1975).

[69] The Court noted with approval the combination of the written notice and personal conference used in the case of welfare recipients. Goldberg v. Kelly, 397 U.S. 254, 268 (1970). The time allowed between notice and action that will be considered fair is also governed by the circumstances. ***Id.*** The oral notice given just moments prior to the meeting with the school principal was adequate in Goss v. Lopez, 419 U.S. 565, 582 (1975). *See also* MacDonald, *Bilingual Notice—The Rights of Non-English Speaking Welfare Recipients,* 42 FORDHAM L. REV. 626 (1974).

[70] Escalera v. Housing Authority, **425** F.2d 853, 863 (2d Cir. 1970), *cert. denied,* 400 U.S. 853 (1971).

[71] Goldberg v. Kelly, 397 U S. 254, 269-70 (1970)

tertwined with the application of rules, regulations, or laws, the right to personally appear before the decision maker is important.;' Personal appearance allows the decision maker to judge the veracity and sincerity of the respondent more easily than he could on the basis of an inanimate written record. Personal appearances have the further advantage of permitting the party to reorient his presentation to areas that the decision maker indicates are of importance to the case during the hearing. For example, restricting the response of a welfarerecipient to a written statement may make it impossible for him to present a meaningful case to the decision-making authority.'[73] An individual's lack of education, incapacity to comprehend the procedures or inability to afford professional help to prepare a written response decreases the value of the right to submit a written response to the charges on which the adverse action is predicated.

On the other hand, if there are no disputes as to the facts on which the action is to be taken, and no factual disputes involved in the operation of the rules, the need for personal presentation of evidence may not be so critical.[74] If the respondent can obtain professional assistance in preparing his written response, that too is important in determining whether oral, written, or both types of presentations must be permitted.

3. Opportunity to Call Witnesses

The right to call witnesses is closely related to the right to be present at the hearing. The issue, of course, is whether or not the respondent must be allowed to call witnesses to buttress his side of the story or whether he will be limited to written statements. In Goss *v. Lopez,* the Supreme Court declined to require that witnesses be called in a hearing to determine whether public school students would be suspended for misconduct. The Court in that case did single out this element of due process, but declined to impose it on the schools. Students were granted face to face confrontation with the school principal who would make the determination.

4. Opportunity to Confrontand Cross-Examine Adverse Witnesses

In a situation involving the testimony of witnesses, there is a danger that such testimony may be given by those whose memories are dim or inaccurate, or by those whose testimony may be colored

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[72] *Id.* at 268: FCC v. WJR, 337 U.S. 265, 275-77 (1949). The latter case involved the application of Federal Communications Commission regulations dealing with radio broadcasting licenses to a specific factual situation. Factual questions were intertwined with the application of the rules.

[73] Goldberg v. Kelly. 397 U.S. 234 (1970).

[74] Goss v. Lopez, 419 U.S. 565, 583 (1975).

by self-interest, malice or vindictiveness.[75] It is important to subject such testimony to careful scrutiny through confrontation and cross-examination by the party who would be injured by the governmental action.[76] If there is no dispute as to factual issues, the need is not so compelling.

5. Right to Counsel

Whether respondents in administrative hearings have a right to be assisted by counsel is a complex question. It is clear, however, that the sixth amendment right to counsel is limited to criminal prosecutions,[77] and the invocation of this amendment is of no particular benefit to the respondent in an administrative proceeding who seeks to establish his right to counsel.

Generally, governmental agencies' regulations are either silent on the issue of counsel or state that the respondent may hire an attorney at his own expense. The courts have generally declined to require the Government to furnish counsel for the respondent in administrative hearings even where privately retained counsel may appear.[78] In those cases in which the rules and regulations of the agency involved provide that counsel may be retained or will be furnished, the respondent has the right to counsel, but his right is based upon the regulation, not upon an independent requirement of due process.[79]

6. Right to Impartial Decision Maker

A fair hearing anticipates an unbiased hearing officer.[80] When public housing tenants are accused of violating housing authority regulations and threatened with termination of their occupancy, due process requires that they be permitted to present their cases before an impartial official rather than before the project manager who initiated the action against them.[81] Likewise, welfare recipients are entitled to a hearing before an impartial decision

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[75] Greene v. McElroy, 360 U.S. 474, 496-97 (1959).
[76] *Id.*
[77] Nickerson v. United States, 391 F.2d 760 (10th Cir.), *cert. denied*, 392 U.S. 907 (1968).
[78] For a general discussion of cases on the right to counsel at administrative hearings, *see* 33 A.L.R. 3d 229 § 5 (1970); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1325-29 (1966); Comment, *The Indigent Parent's Right to Appointed Counsel in Actions to Terminate Parental Rights*, 43 U. CIN. L. REV. 46 (1974).
[79] There is a split of opinion on the effect of regulations that provide that the respondent may be "heard" or "appear." Some courts hold that such a right is tantamount to permitting the hiring of counsel; others disagree. *See* 33 A.L.R. 3d 229 (1970).
[80] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).
[81] Escalera v. Housing Authority, 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1971).

maker as an "essential" element of due process.[82] Nonetheless, not every prior involvement in a matter automatically disqualifies an individual from reviewing the case.[83] The evil to be avoided is combining the duties of investigator or advocate with those of adjudicator.[84] The Federal Administrative Procedure Act requires no less.[85]

7. Conclusions Based on Legal Rules and Evidence Adduced at Hearing

When a hearing is used as the fact-finding vehicle or when the application of facts is intertwined with rules or regulations, the decision maker must reach his conclusions based only on that evidence which was presented at the hearing under the rules of the hearing.[86] In other words, the agency must follow its own rules and must only consider the evidence properly admitted at the hearing. Compliance with this elementary rule[87] must be demonstrated by the decision maker. He does this by setting out in his opinion the reasons for the decision and the evidence he relied on in arriving at it.[88]

8. Record of Proceedings

Occasionally, the courts have required that a record of the proceedings be made available to the respondent. The purpose of a record is to "facilitate judicial review and to guide further decisions."[89] When a full hearing is held subsequent to an initial determination, it is not necessary to provide a record of that first proceeding.[90] When there is no administrative appeal available, a complete record and comprehensive opinion would be in order to insure both the Government and the individual an adequate basis for judicial review. The need for the record of the proceedings obviously rests on the structure of the proceedings in each case.

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[82] Goldberg v. Kelly. 397 U.S. 254, 271 (1970).
[83] *Id.*
[84] Wong Yang Sun v. McGrath, 339 U.S. 33, 44 (1949).
[85] 5 U.S.C. § 556(b) (1970). See discussion in text accompanying note 111 and note 111 *infra*.
[86] Goldberg v. Kelly, 397 U.S. 234, 271 (1970); Ohio Bell Tel. Co. v. Pub. Util. Comm'n. 301 U.S. 292, 299 (1937); Escalera v. Housing Authority, 425 F.2d 853 (2d Cir. 1970), cert. *denied*, 400 U.S. 853 (1971). In *Escalera* the circuit court went so far as to say that when secrecy was desirable in withholding names of adverse witnesses, the information given by such witnesses cannot be used as any part of the basis for the determination that tenants were undesirable, *supra* at 863.
[87] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).
[88] *Id.*
[89] *Id.* at 267.
[90] *Id.*

9. *Right to be Informed of Rules and Regulations Governing the Hearing*

If knowledge of the rules and regulations that will be followed by the decision maker is necessary for adequate preparation for the hearings, those rules must be made known to the respondent beforehand.[91]

The precise mix of due process ingredients which will be required in any given situation is difficult to define. The circumstances of each case including the status of the respondent, the nature of the interest to be affected and the extent of any future disability arising from the action are all factors courts consider when determining what procedures are appropriate. These interests of the individual are not, however, the sole consideration; those of the Government must also be considered.

C. GOVERNMENTAL INTERESTS— THE COUNTERBALANCE

It bears repeating that the first step in determining due process requirements in any given case is to ascertain the precise nature of the interests of both the Government and the individual.92

All levels of government administer a multitude of benefits, rights and privileges. They issue drivers' licenses, liquor licenses, professional certificates, and dog tags; operate prisons, hospitals, and day-care centers; regulate transportation, utilities, and water quality; and are active in innumerable other activities that affect the daily lives of all but the hermit, and possibly he is not exempt. The governmental interests in administering these benefits economically and efficiently must be weighed in each case, and no generalization would be useful other than to state that most disputes center on whether the government or individual interests weigh heavier on the balance scale.[93]

D. BALANCING OPPOSING INTERESTS: DETERMINING PROCEDURAL REQUIREMENTS

Because of the importance of *Goldberg v. Kelly*[94] in any discus-

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[91] Escalera v. Housing Authority, 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. *853* (1971).

[92] *See* text accompanying note *22 supra.*

[93] In Board of Regents v. Roth, 408 U.S. 564,570 (1972), Justice Stewart recalled that ". . . a weighting process has long been a part of any determination of the form of hearing required in particular situations by procedural due process."

[94] 397 U.S. 254 (1970).

sion of due process, that case will be used to demonstrate the method by which courts determine what minimum procedures due process requires. While generally recognized as a significant opinion in the due process area, *Goldberg* is particularly important because its methodology has been utilized in many cases which address the question of what procedures are required to legally terminate government-provided benefits.[95]

In *Goldberg v. Kelly,* suit was initiated by welfare recipients in New York City against the Commissioner of Social Services, who administered the programs[96] under which the plaintiffs received their benefits. The plaintiffs alleged that the manner in which their payments were being terminated was violative of due process of law. The Court first determined that the individuals had a protected property interest in continued receipt of benefits and then set out to isolate the competing interests involved.

1. The Individual's Interests

For the legitimate welfare recipient, the continued receipt of benefit payments is necessary in order to enable him to purchase essential food, clothing, housing, and medical care. Without an adequate income, the eligible recipient's situation quickly becomes critical and the absence of benefits between termination and possible vindication at a hearing would be devastating: the Court referred to the "brutal needs" of the truly destitute recipient. To such a person, the exigency of the moment, obtaining the basic necessities of life, would inhibit adequate preparation for a subsequent hearing, and lack of financial ability would prohibit solicitation of professional counsel for the hearing. Finally, the Court correctly noted that the prevailing lack of educational attainment within the affected group would preclude preparing an adequate written rebuttal.

2. The Government's Interests

On the other hand, the state was properly concerned about the payment of public funds to those not eligible to receive them. The administration of the programs involved millions of tax dollars and thousands of recipients. Within such a program, the potential for wrongful depletion of the public treasury was evident. New York City officials responsible for administration of the programs felt that the use of summary procedures was justified on the basis of

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[95] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Bell v. Burson, 401 U.S. 535 (1971); Escalera v. Housing Authority. 425 F.2d 853 (2d Cir. 1970), *cert. denied,* 400 U.S. 853 (1971).

[96] The programs involved were the New York State General Home Relief Program and the Aid to Families with Dependent Children program.

two pragmatic considerations: first, few contested the initial determination when notified; and second, the city would be unable to recover the bulk of any erroneously paid funds.

However, the government recognized a need to assist in meeting the basic demands of subsistence for those who were unable to support themselves. In creating the programs involved, the government recognized the desirability of providing this minimal assistance to permit meaningful participation in community life and to guard against "the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity."[97] Terminating the benefits of one who was still eligible for and in great need of assistance would defeat the goals of the program.

3. *The Balancing Process*

Balancing the opposing interests of the individual and the government and taking into consideration the circumstances of the parties involved, the Court determined that the hearing should be held prior to the termination of payments.[98] The Court could not ignore the fact that the adverse effects that accompany a wrongful stoppage of funds cannot be adequately rectified by a subsequent restoration of benefits. In addition, there was only one issue to be resolved at the hearing: the validity of the grounds for termination. Prompt resolution of the issue was to the advantage of both parties.

Once having concluded that a pretermination hearing was required, the Court turned to the requirements of that proceeding. In light of the heavy case loads of the caseworkers, the informal nature of dealings between the welfare department and the beneficiaries, and the full post-termination hearing that was already required, the Court stated that only "minimum procedural safeguards, adapted to the particular characteristics of the welfare recipients, and the limited nature of the controversies to be resolved,"[99] needed to be provided by the city. Reaffirming the principle that an opportunity to be heard is the foundation of due process[100] the Court turned to the specific requirements of the case.

Because the opportunity to be heard must be given at a meaningful time and in a meaningful manner,[101] the first requirement is notice that is adequate in terms of both time and detail. The seven-day notice was found to be generally satisfactory; however,

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[97] Goldberg v. Kelly, 397 U.S. 254, 265 (1970).
[98] *Id.* at 266.
[99] *Id.* at 267.
[100] *Id.* at 268 *See also* Grannis v. Ordean, 234 U.S. 385, 394 (1914).
[101] Goldberg v. Kelly, 397 U.S. 254, 267 (1970). *See also* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

the Court noted that in some cases, seven days might not be a fair amount of time.[102] The established combination of the written notice and a personal conference between the caseworker and the beneficiary was both an adequate and particularly appropriate method to inform the recipient of the reasons for his alleged ineligibility.

Secondly, the Court found that in order to make the hearing meaningful, there had to be an "effective opportunity to defend by confronting adverse witnesses."[103] Certainly, in the welfare context, the credibility of the recipient will be important as will the credibility of the witnesses. The need to subject adverse witnesses to the pressure and test of cross-examination is obvious. The manner in which the facts are applied to the rules and policies will also be subjected to greater scrutiny through that procedure.

The third element of due process found necessary under the facts of ***Goldberg*** was the necessity of permitting the recipient to present evidence and arguments orally to the official who makes the final decision on continued eligibility.[104] In light of the average welfare recipient's education and economic status, the use of written statements was found particularly inappropriate. In addition, the written statement was inflexible and not amenable to modification or change in response to the questions or interpretations of the hearing officer.

While the procedures challenged by the plaintiffs permitted the caseworker to orally present the recipient's case, that procedure was found to be inadequate because the caseworker himself had initiated the adverse action. As a result, the caseworker would have personal and career interest in appearing to have wisely and fairly instigated the action which culminated in the hearing. This human problem interfered with his ability to provide a neutral, unbiased presentation of the recipient's case and placed the caseworker in the legally objectionable roles of investigator, representative and adjudicator. Finally, the Court reaffirmed that there must be an impartial decision maker.[105]

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[102] Goldberg v. Kelly, 397 U.S. 254, 268 (1970).

[103] *Id.* There is typically a right to confront and cross-examine witnesses when important interests are at stake. ***See*** Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-04 (1963). There an applicant for admission to the Bar of the State of New York was refused admission by the Committee on the basis of statements by two attorneys who did not appear at the hearing. The Court noted that while the state could deny admission or suspend or disbar any person. that should only he done after a fair investigation and a hearing with opportunity to answer the evidence against an eligible applicant.

[104] Goldberg v. Kelly, 397 U.S. 254. 267-68 (1970).

[105] *Id.* at 271.

Goldberg v. Kelly provides the methodology that should be applied in the analysis of governmental administrative actions that affect protected interests of individual citizens. The decision maker must first determine whether the interest to be affected is a liberty or property interest which is protected by the due process clause. If the individual's interest is protected, the interests of the Government must then be identified and then the conflicting interests must be balanced against each other, taking into consideration the totality of the circumstances.

III. ADMINISTRATIVE DUE PROCESS RESTRAINTS ON THE INSTALLATION COMMANDER'S POWER TO REVOKE ON-POST PRIVILEGES

A. GENERAL

Prior to comparing civilian sector due process requirements with the procedures used by the Army, three preliminary issues must be resolved. First, does the military enjoy a general exemption from the general requirements of due process? Second, if not, can the right to utilize any on-post privileges be categorized as a protected interest? Third, what are the consequences of revocation actions in which the provisions of Army regulations are not followed?

1. *Military Exemption from Due Process?*

Federal courts have traditionally expressed their reluctance to interfere with internal military matters.[106] These decisions often cite the dictum in *Orloff v. Willoughby:*

> But judges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilians. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.[107]

Recently, the Supreme Court reiterated the special disciplinary needs of the military community when it upheld the court-martial conviction of an Army physician for violating Articles 133 and 134 of the *Uniform Code of Military Justice*[108] over the defendant's

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[106] *See* Haessig, *The Soldier's Right to Due Process: The Right to Be Heard*, 63 MIL. L. REV. 1 (1974); Peck, *The Justices and the Generals: Supreme Court Review of Military Actiuities*, 70 MIL. L. REV. 1 (1975) for a review of many of these cases.

[107] 345 U.S. 83, 94 (1953).

[108] UNIFORM CODE OF MILITARY JUSTICE arts. 133, 134, 10 U.S.C. §§ 933, 934 (1970). Article 133 proscribes conduct unbecoming an officer and gentleman, while 134 proscribes conduct "to the prejudice of good order and discipline in the armed forces."

claim that the articles were so vague that they violated the due process clause of the fifth amendment. The Court stated that the need for obedience and discipline in the armed services "may render permissible within the military that which would be Constitutionally impermissible outside it."[109]

Despite this acknowledged difference between the military and civilian communities, it is clear that federal district courts have jurisdiction to hear cases involving attacks upon military procedures that allegedly violate one's constitutional rights.[110] A review of recent cases demonstrates that federal courts are carefully scrutinizing those areas of military management that do not deal exclusively with training or other purely military matters.[111]

While it is true that the armed forces do not enjoy an absolute exemption from the requirements of the fifth amendment's due process clause, the nature of the military mission does weigh heavily in the balancing process. In *Hagopian v. Knowlton*[112] the Second Circuit reviewed the United States Military Academy's procedures for eliminating a cadet who had accumulated an excessive number of demerits. While acknowledging that the establishment of standards of discipline, behavior and personal decorum for cadets should not suffer judicial interference,[113] the court distinguished that issue from the legal sufficiency of the procedures used to eliminate cadets from West Point. The court found that the petitioner had constitutionally protected property interests[114] and required the Academy to provide cadets threatened with elimination with certain procedual safeguards. Nonetheless the court re-emphasized the limited scope of its interference by noting that changed circumstances, such as battlefield conditions requiring immediate action, would alter the due process requirements. As the urgency of the governmental interests increases, the comparative weight of

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[109] Parker v. Levy, 417 U.S. 738. 758 (1974).

[110] Harmon v. Brucker. 355 U.S. 579, 582 (1958); Heikkila v. Barber, 345 U.S. 229, 234-35 (1953); Estep v. United States, 327 U.S. 114, 120 (1946); Reed v. Franke. 297 F.2d 17 (4th Cir. 1961).

[111] *See. e.g.*, Harmon v. Brucker. 355 U.S. 579 (1958) (review of administrative discharge): Hagopian v. Knowlton. 470 F.2d 201 (2d Cir. 1972) (review of cadet's elimination from West Point); Kiiskla v. Nichols, 433 F.2d 745 (7th Cir. 1970) (review of order barring a civilian employee from entering a military installation).

The lack of an exempt status is evident from the language of the revised Administrative Procedure Act. 5 U.S.C.§ 551(1)(G) (1970). Section 551 defines those agencies of the Government that must comply with the act. but exempts from its coverage "military authority exercised *in the field in time of war or in occupied territory.*" *Id.* (emphasis added).

[112] 470 F.2d 201 (2d Cir. 1972).

[113] *Id.* at 204.

[114] Cadet Hagopian's individual interest in a military career and his continued free college education were considered protected interests.

the individual's interests diminishes.

Because the military interests to which the courts give the most deference relate directly to the accomplishment of the military mission, it is arguable that the revocation of on-post privileges should not partake of this special status. Service personnel could argue that many on-post privileges are only tangentially related to the performance of the military mission and that they should be treated as distinct from their military origin. Another more practical reason supports the application of procedural safeguards to the revocation of on-post privileges. It is particularly important to the military commander that he enjoy the trust and respect of his subordinates. Arbitrary and capricious actions that result in personal deprivations are injurious to that relationship and the ill feeling and distrust spawned by such actions could infect an entire command.

2. On-Post Benefits as Protected Interests

Under current constitutional interpretation, the labels "right," "privilege," and "benefit" no longer have any bearing on whether interests are in fact protected by the Constitution.[115] If a "protected interest" is involved, due process protections of notice and hearing are required before the benefit may be terminated.

Each privilege to be considered in this article emanates from either a federal statute or a service regulation. When a person enlists in the armed forces, he or she obtains the right to medical and dental care,[116] the right to shop at the post exchange[117] and the commissary,[118] and to use various other on-post facilities.[119] Disabled veterans and other retired personnel and their dependents are also eligible for some of the privileges.[120] The statutes and regulations provide these beneficiaries[121] with independent

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[115] **See** Section II.A.1. *supra*.

[116] 10 U.S.C. § 1976 (1970); Army Reg. No. 40-3, para. 3-1 (30 July 1975) [hereinafter cited as AR 40-3].

[117] Army Reg. No. 60-20, chapt. 3 (21 Mar. 1974) [hereinafter cited as AR 60-20].

[118] Army Reg. No. 31-200, app. A (12 July 1974) [hereinafter cited as AR 31-200].

[119] **See,** AR 28-1, para. 1-2b.

[120] *See* ***e.g.***, AR 31-200, app. A; AR 60-20, para. 3-8.

[121] While individuals connected with the armed services can trace their privileges to statutes and regulations, civilians with no military connection are normally not eligible to participate in most on-post benefits by terms of the statute or regulation. There are three areas of conflict that frequently require the commander to deal with "pure" civilians. These problem areas deal with the civilian's right to solicit business on post, AR 210-7; the right to drive over streets and roads on post, Army Reg. No. 190-5 (27 Aug. 1975) [hereinafter cited as AR 190-5]; and the right to distribute literature on post, U.S. Dep't of Army, Circular No. 632-1 (1 May 1974). Time and space limitations prohibit discussion of these areas and they are mentioned only to alert the reader to the potential due process difficulties in those situations.

sources for their claims of entitlement and thus, under the Roth criteria,[122] the on-post benefits are protected interests. This conclusion is borne out by the judicial determinations in analogous situations which will be discussed in greater detail in subsequent sections of this article.[123]

Because many benefits have been expressly granted by statute or regulation and because analogous benefits have been held to be constitutionally protected in civilian society, many on-post benefits, rights or privileges are and should be protected by the fifth amendment's due process clause. As such, there must be some type of hearing, or at least the opportunity for a hearing,[124] when those interests are substantially restricted.[125] The exact nature of the hearing is to be determined by balancing the interests of the parties.[126]

These conclusions should not engender visions of scores of formal hearings on every post. The right to due process does not require an actual hearing in every case. Rather it requires that an *opportunity* be offered to the party whose rights are threatened with diminution.[127] Because the beneficiary may waive his hearing by not requesting it, there may be few demands for a hearing in well documented, thoroughly investigated cases. The potential conservation of time and effort represented by a waiver of the hearing encourages the practice of providing the individual with the adverse evidence held by the Government at the time of notification. Detailed disclosure of such information would be required upon request in any event.[128] In the absence of a response within a reasonable time from one who has been properly notified, the Government may revoke the privilege in question on the ground that the respondent has waived his right to a hearing.

3. Requirement to *Follow* Regulations

In Harmon *v. Brucker*[129] a discharged serviceman sought to up-

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[122] **See** text accompanying note 47 *supra*.

[123] **See,** ***e.g.,*** Bell **v.** Burson, 402 U.S. 535 (1971)(revocation of driver's license): Escalera v. Housing Authority. 425 F.2d 833 (2d Cir. **1970),** ***cert.*** **denied.** 400 U.S. 853 **(1971)** (termination **of** public housing occupancy).

[124] The decisions relating to due process are generally couched in terms of *"opportunity to* ***be*** *heard"* (emphasis added), except in cases in which the appellant had attempted to avail himself of due process safeguards and was denied them. In those cases the court may simply say that there must be a hearing. The mandatory nature of this language is normally predicated upon prior request and denial of the hearing.

[125] Board of Regents v. Roth, 408 U.S 564 (1972); Boddie v. Connecticut. **401** U.S. 371. **379** (1970).

[126] Board of Regents v. Roth, **408 U.S** 564, 570 (1972); Goldberg v. Kelly 397 U.S. 254, **263** (1970).

[127] **See** note 124 *supra*.

[128] **See** text accompanying note 66 *supra*. For further recommendations on the notice that should be used by the commander, *see, e.g.*, text following note 213 *infra*.

[129] 335 U.S. 579 (1958).

grade the character of his discharge, alleging that the Army had not followed its own regulations when it characterized his service as other than honorable. The serviceman's conduct prior to his induction into the Army was allegedly considered in the determination of the type of discharge that he was awarded. When the Supreme Court considered the case, it avoided the due process issue and found that the Army had exceeded its authority and had violated Army regulations to the prejudice of the accused. The Court remanded the case to the district court with instructions that Harmon's discharge be characterized solely on the basis of his in-service record.[130] ***Harmon v. Brucker*** is important in that it puts the commander on notice that he must act within the authority granted to him.

The federal courts have on numerous occasions unhesitatingly required the military services and other federal agencies to rectify errors resulting from their failure to comply with their own regulations.[131] In ***Feliciano v. Laird***[132] the court required the Army to follow its own regulation and refer a soldier's application for a hardship discharge to the state selective service director for a recommendation. While the court acknowledged that the director's recommendation was not binding on the discharge authority,[133] it required that the Army reconsider Feliciano's application de novo under the terms of the regulation.[134]

It appears settled that when the Department of the Army promulgates a regulation which extends a procedural benefit or some other protection to a soldier, the failure to comply with that portion of the regulation will be sufficient reason to overturn the Department's action. In other words, whether it is on the basis of due process or statutory construction, it is mandatory that the Army follow its regulations, at least to the point of not withholding or otherwise depriving a respondent of a benefit given him by the regulation.[135]

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[130] *Id.* at 582.

[131] See, *e.g.*, Smith v. Resor, 406 F.2d 141, 145 (2d Cir. 1969); Hammond v. Lenfest, 298 F.2d 703, 715 (2d Cir. 1968); Dunmar v. Ailes, 348 F.2d 51 (D.C. Cir. 1965).

[132] 426 F.2d 424 (2d Cir. 1970).

[133] This requirement was set out in the then current Army Reg. No. 635-200, para. 6-8 (b) (1). ***See*** .2d at 426.

[134] 426 F.2d at 426.

[135] Vitarelli v. Seaton, 359 U.S. 535 (1959), dealt with a Department of the Interior employee who had been fired in the interests of national security. The Secretary of the Interior could at one time summarily dismiss employees on that ground, but he had voluntarily established procedures for such firings. When he failed to follow his own regulations, the Court granted relief to the employee, ***id.*** at 539. *But* ***see*** Drummond v. Froehlke, 460 F.2d 264 (4th Cir. 1972), where the court refused to grant relief when a soldier tried to force the Army to discharge him on the basis of a psychiatrist's gratuitous recommendation that he be discharged as unsuitable for

B. THE POST DRIVING PRIVILEGE[136]

The installation commander's responsibilities concerning the management of traffic safety and the protection of persons and property on the military reservation are very similar to the powers exercised by state governments.[137] Just as states establish requirements for those who desire to operate motor vehicles over their streets, highways and roads, the installation commander administers the rules established by the Department of Army.[138]

In general, the initial requirements for registering a motor vehicle include possession of a valid driver's permit, a valid inspection sticker and license plates, plus liability insurance.[139] Other condition must be met by those who desire to receive the installation commander's permission to drive on post. Some of these requirements will be important in the subsequent discussion of the grounds for suspension or revocation of the driving privilege.

1. Civilian Standards: Bell *v. Burson*[141]

Due to the similarities between the military and civilian practice it will be useful to examine a landmark case decided by the United States Supreme Court which involved the suspension of a citizen's driving privilege. The case of ***Bell*** *v.* Burson involved a Georgia clergyman who was serving the spiritual needs of three rural communities in that state. In 1968, a young girl rode her bicycle into the side of his car. Reverend Bell, having no liability insurance, was notified by the State of Georgia that he would have his driver's license and automobile registration suspended if he could not pre-

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further service. The regulation in that case was not for the benefit of the soldier, but rather for the Army's benefit. Thus, the court would not force the Army to perform the discretionary act of discharging Drummond.

[136] The current regulation appears to extend the most comprehensive safeguards of all the "privilege" regulations concerning suspensions and revocations. Depending on the reason for suspension or revocation. the respondent may have the opportunity for a hearing. but in some situations, prior convictions or adjudications may be the basis of the action. **See** *generally* AR 190-5, chapt. 2.

[137] **See** AR 190-5, para. 1-36. This regulation announces that the goal of traffic supervision is to "reduce traffic accidents and death and injury and property damage resulting therefrom." The traffic management program includes driver education, alcohol rehabilitation programs and street and road engineering. The installation commander's specific responsibilities are set out in Chapter 1 of the regulation.

[138] These rules are included in AR 190-5. Because this article is concerned with the suspension and revocation of on-post privileges, the requirements for obtaining the initial permit are not considered to any greater extent than required to demonstrate the similarity of on-post controls with those in effect off the installation.

[139] The requirements for installation vehicle registration are set out in AR 190-5, chapt. 3.

[140] *Id.* at para. 2-1.

[141] 402 U.S. 535 (1971).

sent a release from liability, post a cash security deposit in the amount of the alleged damages, or file bond.[142] This action by the state was initiated, not because everyone involved in a traffic accident was so treated, but rather because the parents of the child claimed damages of $5,000 in their accident report. Bell was not permitted to present evidence in support of his contention that he was not liable for damages because the injuries resulted from an unavoidable accident. By statute, he could only present evidence that he and his car were not involved or that he fell within some statutory exemption. He did not fall within any such exemption.

The Supreme Court rejected the idea that labeling the issuance of a driver's license as a "privilege" could obviate the necessity of complying with due process when suspending the license.[143] The Court recognized that the state did not have to issue an uninsured motorist a license in the first place,[144] but proclaimed that once it did, the license became an important interest of the licensee which was protected by the due process clause of the fourteenth amendment.[145] Because a protected interest was being adversely affected by governmental action, the precise interests of the two adverse parties had to be balanced to determine the due process requirements that were mandated.

The interests of the clergyman in this case involved the retention of his driving privilege, a necessity for the pursuit of his ministerial calling. The countervailing state interest was to secure payment to a person injured in an automobile accident. The Court resolved the conflict of interests in favor of Bell. It noted that the welfare of injured parties could be served and procedural due process would be satisfied by a limited pretermination hearing on the limited issue of whether there was a "reasonable possibility'' of a judgment against the uninsured motorist and if so, in what amount.[146]

The Court's balancing of interests resulted in only one additional requirement beyond those already provided by the statute. The pretermination hearing was found inadequate because the licensee was not given the opportunity to prove that he probably would not be found liable for the injuries if the case went to court. Due process dictated that this issue be resolved prior to the suspension of the driver's license and vehicle registration.[147] A hearing which precludes consideration of an issue essential to the decision does

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[142] There were other exceptions under the statute, none of which applied in this case.
[143] 402 U.S. at 539.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 540.
[147] *Id.* at 542.

not meet the due process requirements for a meaningful and appropriate hearing.[148]

2. The Competing Interests

Bell *v. Burson* is useful in the examination of problems associated with the on-post driving privilege, and as in that case, a comparison of the interests of the individual driver on post and those of the government is necessary. Without addressing the infinite variations possible, the initial considerations in all of the discussions that follow regarding the individual's interests in on-post privileges will revolve around a hypothetical soldier who may live on or off post. Because a married soldier is likely to have a more substantial interest in the retention of his privileges, we will assume that the individual concerned is married. We are concerned then, by premise, with this hypothetical soldier and his interest in retaining an unrestricted on-post driving privilege.

Loss of the driving privilege for one who works on post obviously will result in a great deal of disruption in his everyday activities. In the absence of convenient public transportation, the ex-driver will find himself walking, imposing on and at the mercy of others, or taking the taxi to and from work. Loss of the right to drive on post will normally mean that commissary, exchange, and other shopping on post will be more difficult and sometimes impossible, depending on personal and local circumstances. The regulation does provide the commander with a means to alleviate the hardship in those cases which would result in "adverse military mission impact, severe family hardship, or be detrimental to the effectiveness of ongoing or contemplated alcohol/drug treatment/rehabilitation programs involving the individual."[149] This provision contemplates the use of a driving privilege restriction limiting the driver to specified facilities and routes. For example, the limits could be from home to duty station, the hospital and commissary and return. The driver could be limited to access through one gate and could have the streets over which he could drive designated. In meritorious cases, this alternative may be used.

The primary governmental interest is the reduction of traffic accidents and accompanying injury, death and property damage. The traffic management program seeks to improve driving habits and street safety through education, training, equipment inspections and removal of hazardous drivers if necessary. In this vein

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[148] *Id.*

[149] **AR** 190-5, para. 2-2c (1) & *(2).*

both military and civilian authorities recognize the necessity of removing certain drivers from the roads.

In this complex area, merely being able to specify the interests and counter-interests is not adequate to determine the form of any hearing that is required. The total circumstances must be considered and in this case that means the various bases for action must be examined.

The driving privilege may be suspended or terminated "for cause"[150] by the installation commander or his designee. There are four primary acts or omissions that may cause one to lose his driving privilege and his post automobile registration along with it.

a. Permitting the original requirements to lapse, *e.g.*, allowing the inspection sticker, driver's license, license tags or insurance to expire without renewing them.[151]
b. Refusal to consent to a chemical blood test when properly requested to do so by an installation law enforcement official.[152]
c. Commission of a serious moving traffic violation.[153]
d. Exceeding permissible traffic point accumulations for moving violations.[154]

In addition to these four violations, there are other infractions which may give rise to suspension or revocation of the privilege. For example, the commander may suspend the privilege for up to six months if he determines that an individual consistently violates the post parking regulations.[155] Regulatory provisions for suspensions and revocations vary depending on the reason for the action, thus each portion of the regulation dealing with these adverse actions must be compared with the civilian due process standards.

3. *Testing the Army Regulation*

a. Mandatory Revocation Offenses

There are seven serious offenses for which the regulation imposes mandatory one-year revocation upon conviction.[156] The "conviction" referred to may be that adjudged by a military or

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[150] *Id.* at para. 2-2.
[151] *Id.* at para. 2-2*b*(2).
[152] *Id.*
[153] *Id.* at para. 2-2*b*(1).
[154] *Id.* at para. 2-2.
[155] *Id.* at para. 6-1.
[156] These are manslaughter, negligent homicide by vehicle, driving while intoxicated, any felony in the commission of which a motor vehicle is used, fleeing the scene of an accident involving death or personal injury, perjury or making a false affidavit or statement under oath to responsible officials or under law relating to the ownership or operation of motor vehicles, and unauthorized use of another's motor vehicle when such act does not amount to a felony. **AR** 190-5, table 6-1.

civilian court or by a nonjudicial determination under Article 15 of the *Uniform Code of Military Justice*.[157] The issue in these cases is whether or not the use of "convictions" obtained in other forums as the basis to revoke or suspend one's driving privilege is in some way violative of due process.

Because the constitutional standards of the sixth amendment regarding criminal convictions are more protective of the accused than those involved in civil proceedings, there is nothing objectionable about using a judicial conviction as the basis for an adverse administrative action. In fact, the court in *Bell v. Burson* indicated that one procedure that Georgia could adopt that would satisfy fundamental fairness would be to delay suspension of licenses until resolution of the issue in a civil court.[158] The standard of proof in the civil court, proof by a preponderance of the evidence, is the same as that used in administrative hearings. Resolution in a criminal court would require an even higher standard of proof. The only possible objection that might be raised to this procedure involves the propriety of using the Article 15 adjudication in the revocation proceedings.

Under the Army Regulation,[159] the burden of proof under the Article 15 procedures is proof beyond a reasonable doubt,[160] again a standard in excess of that required in administrative and civil matters. Other protections afforded in the Article 15 proceedings include the right to personal appearance before the officer who will make the determination in the case, the right to present witnesses and other evidence in defense, the right to consult with an attorney concerning the proposed action before deciding whether to ask for a trial by court-martial, and the right to bring a spokesman to the hearing.[161] The officer conducting the hearing may permit the soldier to cross-examine witnesses against him as an optional safeguard.[162]

To insure that due process standards are met in those instances in which the conviction may be used as the basis to revoke or suspend the driving privilege, a warning to that effect, given before the individual acquiesces to the Article 15 jurisdiction, would strengthen the practice. Similar procedural additions should be

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[157] *Id.* at table 6-1 n.1.
[158] Bell v. Burson, 402 U.S. 535, 543 (1971).
[159] Item 2, DA Form 2627 (1 Nov. 1973), *as promulgated in* Army Reg. No. 27-10 (4 Nov. 1975) [hereinafter cited as AR 27-10].
[160] *See* AR 27-10, app. E.
[161] *Id.* at para. 3-13.
[162] *Id.* at para. 3-14*b*.

utilized when the Article 15 conviction is used to post traffic points[163] on the individual's driving record.

In addition to the seven offenses requiring mandatory one-year suspensions, one act results in a mandatory six-month revocation. That offense is refusing to submit to a chemical analysis for alcohol under the implied consent provision of the regulation. To initially obtain permission to drive on post, the applicant must agree to adhere to the Army and post regulations. Under the Army Regulation, any person granted the privilege of driving on post is deemed to have "given his consent to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if cited or lawfully apprehended for any offense allegedly committed while driving or in actual physical control of a motor vehicle on the installation when under the influence of intoxicating liquor."[164] Although the implied consent regulation may not be used to force the driver to submit, there is a mandatory six-month revocation of his driving privilege if he withdraws his consent.[165]

Under the theory of the *Arnett* case,[166] when a party without claim to a benefit is granted the benefit, the grantor may at the same time establish the procedures by which the privilege may be withdrawn. Under that reasoning, and in recognition of the fact that the applicant receives this privilege subject to the limitations placed thereon, this practice is unobjectionable.

The regulation provides for a hearing prior to revocation under the implied consent provisions. The hearing is limited to three issues:

a. Did the law enforcement official have a reasonable basis for believing that the individual was driving while under the influence of intoxicating liquor?
b. Was the individual informed that his driving privilege would be revoked if he refused to complete the alcohol test?
c. Did the individual refuse to submit to or fail to complete the test when asked to do so by the official?[167]

Unfortunately, the regulation does not further specify the procedures to be used in answering these questions other than by indicating that the individual will be given written notification of the pending action and will be offered "an administrative

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[163] *See* Section III.B.3.c. *infra*.
[164] **AR** 190-5, para. **2-1e.**
[165] *Id.* at para. 2-2*b*(2).
[166] *See* text accompanying note 50 *supra*.
[167] **AR** 190-5, para. *2-2d* (3)(a)-(c).

hearing."[168] Because the procedures are not delineated, normal due process standards should apply. But what are these requirements other than notice, an impartial decision maker, and a decision based solely on evidence properly presented at the hearing?

Application of the rationale set forth in the earlier discussion on the opportunity to rebut evidence[169] indicates that the standard may be satisfied in one of two ways depending on the individual's situation and the issues to be resolved at the hearing. First consider the individual.

The serviceman, retired serviceman, and the dependents of each are entitled to legal assistance,[170] at no expense to them, at the post legal assistance office. Thus, the commander is not dealing with a person such as the welfare recipient in *Goldberg* or the public housing tenant in *Escalera* for whom the courts found the right of written rebuttal to be inadequate in light of their inability to obtain professional assistance in the preparation of a reply.[171] Provided that the local legal office can provide such assistance, that difficulty is overcome. Most members of the military community should be able to avail themselves of the opportunity to provide a written response because they do not suffer the same educational handicaps as the recipients of the benefits in *Goldberg* and *Escalera.*

Aside from these considerations, the general rule is that if the respondent contests the factual allegations, he should be afforded the opportunity to confront and cross-examine the witnesses who supply the adverse information.[172] If there are no factual disputes, then written statements would in all probability suffice.[173]

The issues pertinent to the determination in this case are not so complex as to require government furnished counsel, but there should be no objection to permitting appearance with civilian counsel if furnished by the respondent and personal appearance is deemed necessary.

Because of the lack of specificity in the nature of the offered "administrative hearing," the constitutionality of the regulation's hearing requirement is unclear. The appeal to the installation commander in such instances would not, barring a decision favorable to the appellant, remedy the errors of the initial hearing unless all the requisite safeguards were extended at the appellate level. Thus, with respect to the provisions pertaining to revocations for viola-

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[168] *Id.* at para. 2-2*d* (1).
[169] **See** Section II.B.2. *supra.*
[170] Army Reg. No. 608-50, para. 7 (22 Feb. 1974) [hereinafter cited as AR 608-50].
[171] Goldberg v. Kelly. 397 U.S. 254, 269 (1970).
[172] **See** discussion of elements of due process at notes 70 & 75 *supra.*
[173] *Id.*

tion of the implied consent provisions, the current regulation appears to be constitutionally deficient in those cases in which confrontation and cross-examination are required to determine facts. If the "administrative hearing" includes those rights when appropriate, the contrary result will obtain.

b. Revocation for Failure to Comply With Other Requirements

The Supreme Court confirmed that a state could deny a license to all who did not meet the state's liability insurance requirements.[174] There seems little doubt that the installation commander may do likewise. This rule may be logically extended to cover safety inspections, drivers' licenses, and other valid requirements. Because the driving privilege is extended on the condition that the driver agree to keep these items in force and comply with other regulatory provisions, failure to abide by that agreement may trigger suspension or revocation proceedings. As in the case of the implied consent determinations, the issues involved are limited and even less susceptible to factual disputes: the license is either valid or expired. Due process still requires notice in these actions; but in view of the limited issues involved, and considering the ease with which factual disputes can be resolved by documentary evidence', a written response will normally be sufficient. The regulation's provision for a hearing will in most cases be sufficient for revocations based on the failure to comply with regulatory requirements.

c. Discretionary Revocation/Suspension Actions and Traffic Point Assessments

The post driving privilege may be suspended under two other provisions in the regulation: for commission of one of the six offenses[175] for which the suspension or revocation is discretionary, and for accumulation of excess traffic points.

Two of the six offenses for which the suspension or revocation is discretionary are conditioned upon convictions. As noted in the previous discussion of mandatory revocations, the use of convictions is not objectionable on due process grounds.[176] The other four offenses require a "determination" that the individual committed the offense. That determination may be made by the individual's unit commander, his civilian supervisor, a military or civilian court, or upon payment of a fine or forfeiture.[177]

Unit commanders or other decision makers must conduct an inquiry before taking any action. No report of action is to be forward-

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[174] **See** Bell v. Burson, 402 U.S. 535, 539 (1971).
[175] **See AR** 190-5, app. B, table 6-1.
[176] ***See*** text accompanying note 160 *supra*.
[177] **AR** 190-5, para. 6-2. Traffic points for the offenses listed on the continuation page of table 6-1 may be assessed on the basis of the same type "determination."

ed until completion of any judicial or nonjudicial action.[178] Thus, if the post utilizes the United States Magistrate's Court to dispose of traffic offenses on the reservation, the report of action must await final adjudication in the magistrate's court. The report is forwarded to the installation Provost Marshal for point assessment if appropriate.[179] Points may also be assessed by the Provost Marshal upon notification of a conviction, payment of a fine or forfeiture, and for a traffic violation adjudicated by a state or federal court.[180]

Under the regulation, when points are assessed, the recipient is notified of the action through normal channels. When the point accumulations pass the permissible limit, the driver is notified and offered a pre-revocation hearing similar to that required prior to a mandatory revocation.[181] The question that must be answered by the post judge advocate is whether these provisions comply with the requirements of due process.

The due process requirements in assessment of points and in those discretionary areas would seem to require a sufficient opportunity to respond to those initial determinations, at least at the point at which adverse effect could be felt. Although a driver will normally not lose his driver's permit until he exceeds the allowable number of traffic points,[182] he nonetheless may be identified as a problem driver and be required to attend remedial driving training.[183] There is a required counseling/interview session with the unit commander upon the accumulation of six traffic points. That face-to-face encounter offers only a partial solution to the problems that may emerge.

Because the traffic record follows the individual from post to post, difficulties can be encountered in trying to refute the basis for assessments made at a previous station. Presently there is no opportunity to rebut assessments until just prior to revocation. Thus, a provision should allow the driver to contest point assessments when made. That is especially true in those cases in which the points are based on the payment of a fine or forfeiture of a bond for traffic offenses in state and federal courts. There may be reasons unrelated to guilt for payment of a fine or forfeiture of bond. For example, a soldier ticketed in a distant town may find it economically advisable to pay the fine or forfeit his bond rather than go to jail to await trial, or to return later to contest the charge. Another

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178 *Id.* at para. 6-3*b*.
179 *Id.* at para. 6-3*e*.
180 *Id.* at para. *6-3d.*
181 *Id.*
182 *Id.* at para. 6-1.
183 *Id.* at para. *6-3e.*

possibility is that an individual might intend to return and dispute what he feels is an unjust charge, but military duties or other circumstances may preclude his return. While a soldier in that predicament should consult with a legal assistance officer for aid in obtaining a delay in the proceedings, servicemen are often unaware of this avenue or have been unable to pursue it for various reasons.

To avoid unjust actions, what procedural safeguards should be extended by the commander in those cases in which there are no convictions upon which to base his action? The first requirement is, of course, sufficient notice, giving the driver sufficient time to respond and an adequate description of the charges he must respond to. Other than the ever-present requirement for an impartial decision maker and a decision based on properly admitted evidence, the only other element needed to give the driver a fair hearing would appear to be an adequate opportunity for him to respond to the allegation on which the contemplated action is based. This opportunity may be satisfied by a written or oral presentation, depending on the individual and the issues to be resolved.[184]

Reference to the list of violations[185] reveals that "convictions" may often be available if the administrative actions are delayed. Those, of course, are not the actions which cause the greatest concern. In some cases such a firm basis may never be available regardless of how long the commander waits. For instance, if a civilian declines to permit the United States Magistrate to hear his case and demands trial in the federal district court, the United States Attorney may decline to prosecute such a relatively unimportant case. Such a decision would necessitate the assessment of points on the basis of an administrative determination.

Some of the issues to be settled in these administrative proceedings may dictate the manner in which the respondent presents his evidence. The issue of whether the vehicle owner knowingly and willfully permitted another to operate his motor vehicle when physically impaired[186] requires that the "willful and knowing" issues be resolved. Absent an admission of the truth of these allegations, a personal presentation and a confrontation with the adverse witnesses would seem to be the only fair way to permit the decision maker to resolve such issues. Again, the exact nature of the opportunity to respond must be determined by the facts of each separate case, including the issues to be resolved and the capabilities of the respondent.

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[184] **See** text accompanying note 71 ***supra.***
[185] **AR** 190-5, app. B, table 6-1.
[186] *Id.*

4. Conclusions

Comparing the regulation's procedural provisions with those safeguards that due process would seem to dictate, several deficiencies exist. First, when administrative actions are taken on the basis of nonjudicial determinations under Article 15 of the *Uniform Code of Military Justice*, a respondent may not realize that the factual determination may be used to revoke or suspend his driving privileges. These potential failings can be remedied by assuring that, in those cases in which the results may be used to assess traffic points or to suspend or revoke the driving privilege, the soldier is warned of that possibility. The right to confront and cross-examine adverse witnesses should be afforded in fitting cases. The post judge advocate should advise the troop commander when these additional rights should be extended.

The second problem area, involving determinations by a commander/supervisor that result in suspensions, revocations, or assessment of points, raises the possibility that the commander's or supervisor's inquiry does not meet the requirements of due process. Without explicit directions as to the nature and form of this hearing, most commanders and supervisors will conduct hearings which will probably not pass constitutional muster.

A third problem is that the administrative hearing may not permit confrontation and cross-examination when needed. The regulation does properly call for a pretermination hearing as required in *Bell v. Burson*,[187] however local interpretation of the regulation could either bring it into clear compliance with constitutional standards or reveal it as totally inadequate. For this reason driving privilege revocation procedures require close and continuing coordination with the post legal advisor to assure compliance with due process.

A final caveat is necessary. The circumstances of any particular case could require more stringent safeguards. For example, where the loss of the driving privilege could cause a civilian employee to lose his job, this attendant loss of employment would increase the weight of the licensee's interests, thus requiring greater procedural safeguards to make certain that his method of earning a livelihood not be impaired without clear justification.[188] As the balance of in-

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*- 402 U.S. 535 (1971).

[188] In the case of Kiiskla v. Nichols, 433 F.2d 745 (7th Cir. 1970), a civilian employed at the post credit union was barred from the post as a result of her participation in an off-post demonstration. Because the court found the bar order was issued illegally, it did not reach the issue of whether a hearing was required, but in dictum the court indicated that it would look closely at cases involving the loss of employment to see if due process guarantees were needed.

terests shifts, the procedures which suffice for the "normal" case may no longer be adequate to meet fifth amendment due process standards.

C. THE PRIVILEGE OF LIVING IN POST HOUSING [189]

The commander controls the occupation of government housing on post much like the officials of public housing projects control those housing units. Again, federal court opinions dealing with public housing units are available as guides for evaluating the constitutionality of a commander's actions to control government housing on his installation. The focus of this article is not with eligibility requirements for occupancy of such housing, but rather the manner in which the occupancy is terminated. Specifically, the type of termination that the post judge advocate can expect to raise particular legal questions is where the installation commander determines that the serviceman or his dependents are engaged in misconduct, misuse or illegal use of quarters, and the commander orders the occupants to vacate the quarters pursuant to Army regulation.[190] An Air Force sergeant challenged such an order by his base commander and thus initiated the only federal court decision directly on point.

1. Federal Court Standards

In *Hines v. Seaman*[191] Air Force Sergeant Hines filed suit to temporarily and permanently enjoin the base commander from terminating his occupancy of family quarters at Hanscom Field, Massachusetts. The commander acted pursuant to the Air Force regulation[192] which was very similar to the current Army regulation and provided for termination at the discretion of the commander when family quarters were misused or if the sponsor or his

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[189] If quarters occupants are involved in misuse of family housing or other conduct contrary to safety, health, and morals, the installation commander may terminate occupancy at his discretion by informing the sponsor, in writing, of the reasons for his action. *See* AR 210-50, para. 10-28*c* (13 Apr. 1976)[hereinafter cited as AR 210-50]

[190] *Id.*

[191] 305 F. Supp. 564 (D. Mass. 1969).

[192] Air Force Reg. No. 30-6 (1May 1969). Table 4 sets out reasons for termination. The eleventh reason states that

> if. . . the person who was assigned family housing . . . is a military member civilian employee and there exists misconduct on his part or that of his dependents involving misuse of family housing or other conduct contrary to safety, health. and morals. then the installation commander will terminate family housing at his discretion.

dependents were engaged in "misconduct contrary to safety, health and morals."[193]

About six months after Hines had moved into his quarters, he was informed that his dependent son had recently committed several larcenies on post. Hines was warned at that time that failure to control his son could result in loss of his quarters. After talking to his son, Hines made restitution to the victims, but ten months later Hines' son was again arrested, this time for molesting two girls on base. Three days later the sergeant was called before one of the deputy commanders and was told that his occupancy of base housing was being terminated. There was no written notice of charges and no chance to hear or examine evidence at this meeting. The representative did make reference to the prior misconduct as a justification for the removal action.

A week after this conference, a letter was sent ordering Staff Sergeant Hines to vacate his quarters within one month. Included in the letter was a reference to the reasons given him at his meeting with the deputy base commander. Following receipt of the letter, the airman sought injunctions and a declaratory judgment that the Air Force regulation, as applied to him, was an unconstitutional violation of the due process clause of the fifth amendment.

The district court ruled that Sergeant Hines had no more rights than a "mere licensee" and that he did not have tenant status as he claimed. The court did not enumerate the "interests" of either the Government or the airman. It viewed the issue as whether or not the commander should have given Hines formal notice, should have conducted a quasi-judicial hearing with full opportunity to hear and be heard, and should have entered a formal, quasi-judicial order.[194] The court noted that Hines' meeting with the deputy commander gave him actual notice of the action and an opportunity to be heard.[195] Finding confrontation and cross-examination rights to be unnecessary, the court dismissed the due process arguments noting that "Army *[sic]* housing and like privileges and perquisites in the military establishment are bounties, acts of grace, and areas of discretion."[196]

The classification of the housing privilege as a bounty and act of grace is clearly no longer dispositive of whether due process guarantees apply. This case was pre-Goldberg and pre-Roth and for that reason hinges at least partially on a theory that has lost its

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[193] *Id.*
[194] 305 F. Supp. at 566
[195] *Id.*
[196] *Id.* at 567-68

viability. The federal district court did not say that "bounties" were not worthy of protection, but it did reach the conclusion that the Constitution requires no more of the military in terminating housing occupancy than is expected of a civilian property owner. That statement ignores the fact that the private property owner is not bound by the provisions of the fifth amendment.

Hines is not a reliable gauge of present day requirements. As noted earlier, the Supreme Court has since put to rest the previously important distinction between "right" and "privilege."[197] The Court has also enunciated clearer guidelines on due process that would seem to run counter to the holding of *Hines*.

However, a post-Goldberg case involving the termination of housing in a federally funded housing project provides insight into more current standards in eviction cases. Decided in 1970, *Escalera v.* New *York Housing Authority*[198] was a class action suit filed by tenants in public housing projects. The projects were financed by federal, state, and city funds and were managed by the New York City Housing Authority. The tenants challenged the constitutionality of the procedures used by the Authority in three types of actions: termination for nondesirability; termination for violation of rules and regulations; and the assessment of "additional rents" for undesirable acts.[199] Because the district court dismissed the action on the merits at the show cause hearing, the Second Circuit necessarily viewed the allegations in the light most favorable to the appellants. In doing so, it assumed that the allegations of the tenants could be proved and that the government's interests did not substantially affect those of the individuals.

The leases of the tenants provided for a month-to-month tenancy which was automatically renewable. If a tenant was found to be "nondesirable," the lease was terminable by a month's notice. The Tenant Review Handbook defined a nondesirable family as one that

> constitutes ... a detriment to health, safety or morals of its neighbors or the community; an adverse influence upon sound family and community life; a source of danger or cause of damage to the property of the Authority; a

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[197] ***See*** Section **II.A.1.** *supra*.

[198] 425 F.2d 853 (2d Cir. 1970), ***cert. denied,*** 400 U.S. 853 (1971).

[199] Because the commander does not assess additional rents and because the procedures for termination for violation of housing authority regulations are not particularly in point, examination of this case will be restricted to that portion most closely related to the termination of on-post quarters, that called "termination for nondesirability." There are provisions in the Report of Survey system to recover for some damages to government quarters. That procedure is covered in Army Reg. No. 735-11 (1 May 1974), and is an action not necessarily related to the termination of quarters.

> source of danger to the peaceful occupation of the other tenants: or a nuisance.[200]

Under the procedures in effect at the time of the suit, once the project manager determined that he should recommend termination for nondesirability, he would call the tenant in for a meeting at which the proposed recommendation and the undesirable activity were discussed. During this conference, the entire history of the tenancy was reviewed from the information in the tenant's folder and the tenant was given a chance to explain the questionable activity. If the project manager still felt termination to be proper, he informed the tenant that he could submit a written statement which would accompany the manager's recommendations and the tenant's folder to the Authority's Tenant Review Board.

Upon receipt of the folder, the Tenant Review Board made a preliminary determination. If that determination was adverse to the tenant, the Board would notify him in writing that:

1. It was considering a recommendation of nondesirability;
2. He could appear and tell the Board his side of the story if requested an appearance within ten days; and
3. If appearance was requested, the respondent would be informed of the nature of the conduct under consideration.

Failure to request appearance within the ten days resulted in a final determination of nondesirability.[201] The notification received by the respondent upon his timely application for personal appearance included the time and place of the hearing, the general definition of "nondesirable," a short statement of the nature of the particular conduct involved and the fact that he could bring someone to assist him at the hearing.[202]

The hearing itself was before a panel of two or three members of the Review Board. Rather than soliciting the testimony of witnesses, the panel would usually read a summary of the entries in the tenant's file. The tenant could question any witnesses who did appear and could comment on the written entries. The respondent was generally denied access to his folder, the names of those who complained against him, the summary of entries, and the rules and regulations governing the Review Board and its panels. No transcript was maintained. The panel could consider the entire folder, including the portions to which the respondent was never

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[200] Tenant Review Handbook. Chapter VII, para. I, art. B at 4. *cited in* Escalera v. Housing Authority, 425 F.2d 853, 857 n.1 (2d Cir. 1970).
[201] 425 F.2d at 858.
[202] *Id.*

given access in either the written notice or at the hearing itself.

In ***Escalera,*** the Authority initiated termination proceedings against one of the tenants after his arrest on a narcotics charge several miles from the project. **A** separate termination action was begun against another tenant based on several alleged anti-social acts by a dependent, including a charge of statutory rape. These termination actions were based on the lease provisions for termination of those families found to be "nondesirable." After completing the procedures outlined above, the Tenant Review Board notified the tenants that they were no longer eligible to occupy the project housing and that they were to vacate the project within one month. No findings or reasons were given for this decision.

It is evident from the definition of a "nondesirable" family that the government's interest in terminating the tenancy under this provision was based upon a concern for the health, safety and morals of the remaining tenants, and the community. The public housing program was instituted to provide for sanitary and safe dwellings for low income families. The housing projects were built to provide housing to replace that which was unsafe or unsanitary due to overcrowding, poor maintenance, bad lighting, and other conditions that endanger the safety of people and property. Such conditions "cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values."[203] Where certain tenants jeopardize the attainment of these goals by their antisocial conduct, the government has a strong interest in removing them from the housing project. Another concern of the Authority, much like that of the installation commander, is that government property also must be protected. No one can legitimately argue that these are not important governmental interests.

The individual tenant in the public housing unit likewise has a strong interest in maintaining his eligibility to occupy public housing. Tenants in such projects must have low family incomes, and housing in such facilities is furnished at a cost generally far below that of equivalent housing in the community. Such a tenant is vitally concerned with a fair hearing prior to being evicted. Not only will alternative housing be considerably more expensive, but reinstatement in public housing is typically jeopardized by long waiting lists for occupancy. In addition, wrongful eviction requires the tenant to bear the expense of moving out and of finding alternative housing for the family.

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[203] N.C.GEN. STAT. § 157-2, ***cited in*** Calder **v.** Durham Housing Authority, 433 F.2d 998, 1003 n.2 (4th Cir.), ***cert. denied,*** 401 U.S. 1003 (1970).

The court, after acknowledging that it would be improper to prescribe minimum procedural requirements without the benefit of fully developed facts (including the conflicting interests of the parties), enunciated the standards that would be required if the allegations were proved and the government failed to establish a "great need"[204] for expedited procedures.

The hearings furnished by the Housing Authority were found to be constitutionally deficient in four particulars. First, the notice was inadequate in that it failed to give sufficient opportunity to counter the evidence that could have been considered in the decision to terminate. That deficiency was not cured by the meeting with the manager because he also failed to divulge all of the entries in the folder that could have affected the Board's adverse determination. Second, the tenant should have been granted access to all the materials that could affect the decision so that he would have a chance to rebut them. Any items which remained secret could not be used to arrive at the determination because the decision must rest on the evidence considered at the hearing.[205] Third, the tenant should not have been denied the right to confront and cross-examine the witnesses against him. If the Board desired not to reveal the identity of a witness, his testimony could not be used in reaching the decision on eligibility.[206] The fourth deficiency was the Board's refusal to divulge the rules and regulations which governed the procedures before the panel and the Tenant Review Board. Whether such information was necessary to the respondent's preparation for his hearing would be left for determination by the trial court.

The *Escalera* case does not stand alone. Several other public housing cases embrace the same general rules.[207] In *Caulder v. Durham Housing Authority*,[208] the Fourth Circuit Court of Appeals took the position that due process protection must be accorded tenants before their occupancy of public housing units may be terminated for misconduct. That case held that to be constitutionally proper, pretermination hearings must provide the following procedures:

1. Timely and adequate notice detailing reasons for the proposed termination.

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[204] 425 F.2d at 867.
[205] *Id.* at 86%.
[206] *Id.* at 862. *citing* among other cases. Goldberg v. Kelly. 397 U.S. 254 (1970).
[207] ***See.*** *e.g.*, Caulder v. Durham Housing Authority. 433 F.2d 998, 1003 n.2 (4th Cir.), *cert. denied*. 401 U.S. 1003 (1970); Rudder v. United States. 226 F.2d 51 (D.C. Cir 1955).
[208] 433 F.2d 998 (4th Cir.), *cert. denied*. 401 U.S. 1013 (1970)

2. An opportunity to confront and cross-examine adverse witnesses.
3. The right of a tenant to be represented by counsel provided by him to help delineate the issues, present factual contentions in an orderly manner, conduct cross-examination and generally safeguard the tenant's interests.
4. A decision based on evidence adduced at the hearings in which the reasons for decision and evidence relied on are set forth.
5. The right to a hearing before an impartial decision maker.[209]

As in ***Escalera,*** the ***Caulder*** court was dealing with allegations rather than developed facts because the district court had dismissed the case on the respondents' pretrial motion. Both courts did, however, recognize the possibility that the government might be able to establish compelling reasons for summary proceedings. The effect of any such proof was necessarily left for the district courts to weigh against the individuals' interests.

2. The Competing Interests in the Military

The military commander shares many of the interests that concerned the municipalities in the public housing cases. However, there are several important differences, especially with regard to the individual's interests. The evaluation of the individual's interest in continued occupancy varies with the installation, with the housing situation in the adjacent communities, and with the proximity of those communities to the installation. It must be borne in mind that the serviceman occupant, in addition to being furnished housing, is also freed from the requirements of maintaining the quarters, making repairs, and paying for the utilities. In addition to such direct financial benefits, on-post living generally leads to a more convenient and economical life. Automobile insurance rates and operating expenses should be diminished by living near work, the commissary, the exchange, hospital and other post facilities.

These are some of the factors that may cause the value of an individual's interest to fluctuate, sometimes drastically. For example, if the nearest adequate housing is located twenty-five miles away, the personal dislocation and commuting costs may entail enormous additional expenses. In other cases, adequate housing off post may not be available at a reasonable cost. These and other factors may combine to make the loss of the right of continued occupancy of quarters a substantial detriment to the individual.

While weighing the detriment to the military tenant, there are

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[209] *Id.* at 1004.

certain offsetting factors that must be recognized. The soldier who is ordered off post as a result of misconduct or illegal use of quarters is normally moved at government expense.[210] At the same time, his quarters allowance is reinstated.

One of the primary reasons for terminating a serviceman's on-post housing privilege is his misconduct or that of his dependents. The installation commander is charged with protecting property on post,[211] as well as controlling crime on the reservation. Included in this responsibility is his duty to insure that post residents are not victimized by others, including other quarters occupants. If a dependent or serviceman has been involved in larcenies, assaults, or other crimes against property and persons, he may threaten the safety of the post if allowed to remain on the installation. Under such circumstances, the commander may decide to remove the offending service member and his family from government quarters.

The particular offense involved will determine the need for immediate action. The normal case will not require immediate vacation and will permit more deliberate proceedings if requested by the sponsor.

3. *Testing the Army Regulation*

The current regulation states that quarters occupancy is terminable at the discretion of the commander.[212] The only procedural requirements are that the occupant be notified in writing when his quarters are to be vacated and the "specific conditions under which the termination is being accomplished."[213] Such a procedure would not be legally sufficient except in extreme circumstances which included a much greater need for prompt action than is normally present.

When the balancing test is applied to the conflicting interests of the serviceman and the Government, it is apparent that no single standard will be practical. In some instances there may be little or no hardship associated with the termination of quarters occupancy. In other cases the results could be extremely burdensome. In the latter cases there should be a pretermination hearing unless there is a critical need to promptly remove the individuals from the reservation.

While local regulations should allow for more safeguards when

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[210] AR 210-50, table 10-3.
[211] See generally AR 210-10.
[212] AR 210-50, para. 10-28*a*(4)
[213] *Id.* at para. 10-28.

the situation demands it, there are minimum safeguards that should be followed in all cases. The following safeguards should be provided in the termination of post quarters under normal circumstances:

1. Notice of the proposed termination with detailed description of the reasons for it.
2. Notification that the respondent has the opportunity to appear for an administrative hearing if he so requests within seven days of receipt of the notice. If the party fails to request a hearing, the commander or his designee may order the family to vacate the quarters within a reasonable time.
3. If the occupant requests a hearing, the sponsor should be furnished with copies of the documentary evidence to be used against him and summaries of testimony relied upon by the commander so that the sponsor may adequately respond to that evidence in a written statement.
4. The tenant should be informed that he may seek legal or other advice in the preparation of the statement for the hearing officer. This right, as opposed to the one in ***Goldberg,*** is not illusory. With the availability of legal assistance officers at no expense to the soldier, this assistance should be adequate in making a meaningful written presentation to the hearing officer.
5. As in ***Escalera*** and ***Goldberg,*** the decision should be grounded on the evidence properly presented at the hearing.
6. The decision maker should be impartial.

It is probable that the vast majority of those sponsors who are so notified will not request a hearing, especially if they are presented with the documentation on which the preliminary determination was made. Inclosing the documentary evidence along with the original notice in dependent cases has the added advantage of exposing the seriousness of the case to the sponsor at an early date, and tends to counter the fact that dependents do not always tell the complete story to their sponsor. Early revelation of the government's case may preclude a request for a hearing and speed the administrative process.

As a general rule, off-post housing will cost the soldier more than his quarters allowance, and any number of other factors may join to make the individual's interest in not being wrongfully terminated outweigh the government's need for summary proceedings. Thus, a pretermination hearing of at least a rudimen-

tary nature should be provided to comply with due process standards.

4. Conclusions

Comparing the regulation's summary manner of terminating occupancy of on-post quarters with the safeguards that protect the civilian housing project tenant, serious questions arise as to the adequacy of the military procedure. Even with the varying conditions around military installations that affect the extent of a service person's interests, due process would demand more than bare notice to vacate.

As indicated in the preceding discussion, an infinite variety of circumstances potentially affect the nature of the required hearing. Rather than set an extremely high standard to cover all cases, the commander should create a standard that meets the needs of most cases. This approach, of course, imposes a responsiblity on the post judge advocate to recommend greater protections when demanded by the circumstances, but this is preferable to an excessively burdensome hearing in all cases.

The recommendations for hearing standards set forth earlier will generally prove to be a constitutionally adequate method of terminating the housing privilege. These suggestions can be implemented locally and thus take account of the local circumstances. In some situations the proposed standards will exceed the due process requirements, but this course is less objectionable than setting the standard too low and risking court intervention. Because a number of hearing waivers can be expected, this additional requirement should be neither excessively burdensome nor harmful.

D. COMMISSARY SHOPPING PRIVILEGE [214]

The privilege of shopping in the commissary store is governed by an Army regulation.[215] The primary purpose of the commissary store is to provide "subsistence and household supplies" for purchase by authorized patrons.[216] Statutory authority for the commissary store is found in the United States Code,[217] and by regulation the installation commander is given the supervisory respon-

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[214] No hearing of any sort is presently offered the commissary patron prior to revocation of his shopping privileges. *See* Army Reg. No. 31-200, paras. 11-90 through 11-93 (7 Aug. 1973) [hereinafter cited as AR 31-200].

[215] *Id.* chapt. 11.

[216] *Id.* at para. 1-5b.

[217] 10 U.S.C. §§ 4621, 4333 & 4561 (1970).

sibility for the operation of this facility.[218]

The pricing policy in the commissary store is generally designed to recover the store's purchase price including the cost of commercial transportation of goods.[219] A surcharge is imposed to meet store operational expenses including operating supplies and equipment, maintenance of operating supplies and equipment, cost of utilities and wastage, spoilage and pilferage.[220] The regulation proscribes selling or giving away commissary store purchases.[221]

1. The Individual's Interest

Even this brief view of the pricing policy indicates that as a general rule, substantial savings can be realized by shopping at the commissary store. While it is true that in the continental United States, the soldier can sometimes take advantage of sale items in local supermarkets which will be less expensive than the same or equivalent items in the commissary, one who shops consistently at the commissary should realize savings estimated at about 31 percent.[222] Overseas, the value of the commissary shopping privilege may become even more valuable to the service family because it is the sole source of some items.

The loss of the commissary privilege to a family with a low per capita income may mean the difference between balanced meals and those that are not. The severity of the loss, of course, depends on family and local circumstances. Some essential items such as milk are significantly less expensive through the commissary than through civilian sources. The dominant interest for the individual is thus an economic one which may have serious nutritional ramifications depending on income level, the number of dependents, and other variables.

2. The Government's Interests

On the other hand, the installation commander is interested in protecting both the commissary system and individual stores. Abuses of the privilege deprive local merchants of business when

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[218] AR 31-200, para. 2-4.
[219] *Id.*
[220] *Id.* at para. 11-17.
[221] *Id.* at para. 11-91.
[222] Telephone conversation with Mr. Carl A. Timm, Commissary Specialist, United States Army Troop Support Agency, Fort Lee, Virginia, 5 April 1975. The figure of 31% is based on a survey of ten commissaries in the United States which was completed in March 1975 for the Office of the Secretary of Defense in connection with current commissary planning. The figure for savings as indicated in the last triannual survey in 1972 was 32%. Figures announced by a joint service study group relating to savings realized by commissary shoppers indicated a savings of between 20 and 22 percent. Army Times, July 16, 1975, at 6.

unauthorized parties receive commissary goods and such abuses can result in increased pressure from civilian sources to eliminate the stores, at least in those areas in which there are adequate sources of subsistence and household supplies at reasonable prices.[223] The Government is interested in other abuses because the commissaries are appropriated fund activities and the stores' supplies, equipment and merchandise are property of the United States. Those who pilfer, misappropriate or steal that property can be prosecuted under the *Uniform Code of Military Justice* or other federal statutes.[224] In fulfilling his responsibility to protect government property, the commander has a vital interest in preventing those who abuse the commissary privilege from continuing that practice.

3. *Balancing for Hearing Requirements*

In balancing the conflicting interests, there is no "brutal need"[225] that weighs heavily in the shopper's favor as there was in the *Goldberg* case. Likewise, there normally is no pressing need for instantaneous action by the Government. This situation allows some form of pretermination hearing to determine if there are adequate grounds on which to base the temporary or permanent revocation of the commissary privilege. A permanent revocation would naturally carry with it more severe financial ramifications for service families or other authorized patrons. More procedural safeguards should be offered in such situations. As a general rule, under usual circumstances, the following procedural safeguards should be afforded the patron:

1. Written notice of the proposed action with detailed explanation of the reasons for the action.

2. Notification that the patron may submit written statements on his behalf, explaining that he may consult with counsel at his expense in the preparation of the statement. Normally, the respondents could be required to respond within seven days of receipt of notice. Field duty or other unusual circumstances might call for additional time.

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[223] AR 31-200, para. 11-2 states:

> The mission of commissary stores is to provide subsistence and household supplies for sale to authorized patrons at installations where adequate commercial facilities are not conveniently available. or when commercial facilities do not sell such supplies at reasonable prices.

[224] AR 31-200, para. 11-94.

[225] This language was used by the Court in the *Goldberg* case regarding the critical nature of the welfare payment for the truly eligible welfare recipient. Goldberg v. Kelly, 397 U.S. 254. 261 (1971).

3. If the patron is being labeled a thief or where his "good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[226] In such an event, the notice should inform the suspect that he may request that he be allowed to personally present evidence to refute the allegations at a hearing before the commander's representative.
4. The hearing should be held before an impartial hearing officer.
5. The decision should be based on substantial evidence properly admitted into evidence at the hearing.

As an alternative to this procedure, the commander may wish to await disposition of court-martial or magistrate's court charges when the abuse consists of misappropriation or stealing government property. The standards of proof and of due process in the courts are more than adequate to give the individual his fair hearing. The problem with this alternative is that there is often greater delay associated with it than is desirable. Another problem may also arise, depending on the manner in which access to on-post facilities is controlled.

Control of access to the commissary, post exchange and theater may be accomplished by prominently overstamping the individual's identification card with such an annotation as "EXCHANGE NOT AUTHORIZED."[227] Such annotations would be seen by employees in those facilities in which the card holder remains eligible to frequent, such as the hospital. At commands in which this practice is followed, there is additional impetus for a fuller hearing prior to such labeling.

The Supreme Court, in Wisconsin *v. Constantineau*,[228] required that the State of Wisconsin provide notice and an opportunity to be heard before certain notices could be posted in all retail liquor outlets. The Court, in that case, quoting Weiman *v. Updegraff*[230] reiterated that when the Government attaches "a badge of infamy" to the citizen, he is protected by the due process clause. The Court continued by citing Joint Anti-Fascist Committee *v.* McGrath:

> . . . [T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.[231]

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[226] ***See*** Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).
[227] Joint Message Form, DA TAG/1DAAG-ASP-R11, 1513082 March 1973.
[228] 400 U.S. 433 (1971).
[229] ***See*** text accompanying notes 57-59 ***supra.***
[230] 344 U.S. 183 (1952).
[231] Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1950).

Although the overstamping of the identification card is not so public or specific as the notices in *Constantineau*, it is arguable that a badge of infamy is thereby attached to the card holder.

This is not to say that no one should have his card stamped. Such action should be taken only after a fair hearing to determine that the grounds are well-founded. Personal confrontation is necessary in such cases to judge the respondent's sincerity and veracity. If the government's case relies on the testimony of a security guard or an employee, that party should appear to be cross-examined by the patron. The overstamping of the frequently used I.D. card, in such a manner as to indicate some misdeed on the holder's part, is no small consideration and thus greater safeguards are required in those commands that follow that practice.

4. Testing the Army Regulation

The regulation in this case does not provide for any type of hearing before either temporary or permanent revocation of the commissary shopping privilege. Because this shopping privilege has been extended to patrons by regulation, any substantial diminution of this important benefit must be preceded by some type of hearing under the rationale developed by the courts and as demonstrated earlier in this article.

A hearing is also dictated in those instances in which a stigma is attached to the party when his identification card is overstamped with "NO COMMISSARY AUTHORIZED" or with some similar language. In this latter case, one's liberty interest combines with the property interest in the shopping privilege to establish the requirement for a hearing. The failure of the regulation to provide for any type of opportunity for the patron to respond to the alleged improprieties makes the regulation constitutionally objectionable.

The need for notice and an opportunity to rebut adverse evidence is essential to due process in this situation. The hearing may be a special administrative hearing established by Army or local regulation or may be satisfied by awaiting the individual's conviction in civilian or military court. Subject to the comments in the section dealing with the driving[232] privilege, the use of "convictions" under Article 15 of the *Uniform Code of Military Justice* may also satisfy this requirement. As presently written, the regulation is subject to legal attack for failing to provide due process in revocations and suspensions of this valuable benefit.

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[232] **See** Section III.B.3. *supra*.

E. POST EXCHANGE SHOPPING/SERVICE PRIVILEGE[233]

The Army and Air Force Exchange System is a nonappropriated fund instrumentality of the United States.[234] Its mission is to supply both "merchandise and services of necessity and convenient . . . to authorized patrons at uniformly low prices."[235] The exchanges are also to "generate reasonable earnings to supplement appropriated funds for the support of Army and Air Force welfare and recreational programs."[236] Installation commanders are assigned responsibilities with respect to their tenant exchange facilities to include "enforcing patronage control and identification procedures."[237]

An Army regulation[238] governs the revocation and suspension of the exchange shopping and service privileges. That regulation directs commanders to ". . . take prompt and effective action to revoke exchange privileges for any abuses of the exchange privileges."[239] The abuses which trigger the curtailment of the exchange privileges fall into four general categories: making purchases for unauthorized persons; using exchange goods and services in an income-producing scheme; shoplifting; and bad check offenses.

1. *The Individual's Interest*

The exchange privilege is an important one to most servicemen and their families. Normally, they use several of the exchange facilities, such as the laundry and dry cleaning concession, barber and beauty shop, watch repair, automobile service station, portrait facility and others when available. The exchange system provides reliable, guaranteed services and products at prices lower than generally available off the installation.

In evaluating the value of exchange service to the individual, it must be recognized that around most stateside installations there are discount stores and other retail facilities that occasionally offer items at extremely low prices to encourage customers to shop at their stores. Still, the exchange offers considerable savings to those who use it regularly.

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[233] At present, the suspect patron must be given notice of his alleged wrongdoing and "an opportunity to present evidence on his behalf." Army Reg. No. 60-20, para. 3-13 (29 Aug. 1975) [hereinafter cited as AR 60-20].
[234] Army Reg. No. 60-10 (21 Mar. 1973) [hereinafter cited as AR 60-10].
[235] *Id.* at para. 1-2*a*.
[236] *Id.* at para. 1-2*b*.
[237] *Id.* at para. 2-5*a*(b).
[238] AR 60-20, para 3-13.
[239] *Id.* at para. 3-13.

Overseas, the exchange privilege is more important than in the United States as it provides the additional benefit of being the only convenient source of some items. Even those American products available in the local area will generally be more expensive as a result of import and sales taxes. The quality control exercised by the exchange system and the guarantee are also lost to the disenfranchised patron. Not to be dismissed lightly is the convenience factor, especially for those who live and work on the post.

2. The Government's Interest

The installation commander has several interests in controlling abuses of the exchange system. First, because the exchange system is a self-supporting operation, any losses caused by shoplifting and uncollectable checks must be recouped from the other patrons. Second, decreases in profits also diminish the exchange system's support of the welfare and recreational programs on post. Third, abusing the system by procuring merchandise for unauthorized patrons can cause increased pressure from local merhcants to have the exchange program curtailed. The commander thus must assure that unauthorized parties are not permitted access to the facilities. Fourth, the commander's responsibility for the prevention of crime on post is involved in preventing shoplifting, passing bad checks, and other criminal acts. Fifth, in overseas areas, procuring import tax free articles for those not authorized to patronize the exchange facilities may violate and jeopardize the international agreement under which the system operates. Thus, the Government has significant interests in limiting sales to authorized patrons and in minimizing losses of goods through criminal activity.

3. *Balancing for Hearing Requirements*

Even considering the greater need for the exchange services overseas, the Constitution would not seem to require stringent safeguards for these rights. Most items available at the exchange are generally available elsewhere, although at a slightly higher cost. The regulation allows for controlled access to the exchange to "satisfy appearance, health and sanitary requirements"[240] even while the privilege is suspended or revoked. Therefore, the loss of the exchange privilege would not necessarily deny the serviceman this source for items necessary for health and the maintenance of military appearance. The addition of a family can greatly increase the number of needs served by the exchange system. However, goods provided dependents are to a large extent convenience and luxury items.

It seems evident that under these circumstances, the interests

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[240] **AR** 60-20, para. 3-13*c*

affected do not require the full panoply of constitutional safeguards. Still, a meaningful opportunity to be heard in a meaningful way as prescribed by the Court in *Armstrong v. Manzo*[241] is required. **As** noted in the discussions of the various procedural safeguards, the opportunity should be tailored to the particular individual and the circumstances of the case. In light of these factors, rather than trying to establish a hard and fast standard that will cover all contingencies, the typical situation will again be considered in order to obtain a standard that will be adequate for most situations.

In weighing the conflicting interests that were isolated in earlier paragraphs, the resulting safeguards would seem to be:

1. Written notice of the proposed revocation to include a detailed description of the allegations against the party.
2. Notification that the privilege will be revoked in ten days unless within that period the respondent requests the opportunity to be heard. He shouldhave the opportunity to have the assistance of counsel in preparing any statement.
3. If a timely request for a hearing is made, written statements and evidence will usually be adequate to provide due process in the continental United States. Overseas, the increased importance of the privileges and the facts in issue may require personal appearance before the commander's representative. If the I.D. card is overstamped, a hearing should be granted with confrontation and cross-examination.
4. **As** usual, the decision should rest on substantial evidence adduced at the hearing and properly admitted into evidence under the governing rules.
5. There should be an impartial hearing officer.

4. Testing the Regulation

The regulation provides that the extensive procedures set forth in **Army** Regulation Number 15-6 may be used in ascertaining whether the exchange privileges should be revoked "when appropriate."[242] That regulation sets forth the procedures for conducting investigations not covered by specific procedures and provides for notice of the hearing, the names of the adverse witnesses as well as notice of the matter to be investigated. It provides that the respondent may request witnesses, may be present during open

[241] 380 U.S. 545, 552 (1965).
[242] **AR** 60-20, para. 3-13*c*.

sessions, may call witnesses, may submit a written brief, may cross-examine adverse witnesses, and may have counsel present at the hearing. If counsel if furnished by the Government, he need not be legally qualified. There is nothing objectionable about the use of such procedures.

As an alternative to these comprehensive procedures, the post exchange regulation prescribes, as a minimum, that the individual be informed of the allegations against him and be given "an opportunity to disprove the allegations and offer evidence on his behalf."[243] Because the command may revoke the privileges for any appropriate length of time, the duration of the revocation imposed might be cause to increase the safeguards. Just what "opportunity to disprove the allegations" and to "offer evidence on his behalf' means is unclear from the terms of the regulation.

The regulation generally provides for adequate procedural due process. Still, the language is broad and the interpretation of "opportunity" could be so restricted that the proceedings would fall short of the mark in some cases. Due to the varying conditions, this area is one ripe for local implementation to assure that the rights of patrons are protected.

Posts around the country are finding themselves in position to avoid a separate administrative hearing for shoplifters, those who write bad checks and others who commit similar offenses. Where such instances are referred to the magistrate's court for disposition the conviction for shoplifting in the magistrate's court will satisfy the due process requirements for the administrative revocation of the PX privilege just as traffic convictions are properly used in driving cases. If the individual is convicted under the higher standard of proof, "beyond a reasonable doubt," and with greater procedural safeguards, it can be considered a constitutionally adequate basis for an administrative revocation of the PX privilege.

F. RECREATION AND ENTERTAINMENT BENEFITS[244]

In an effort to increase the effectiveness of the armed forces, the Army Recreation Services and other programs are designed to foster high morale and to maintain the mental and physical fitness

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[243] *Id.*

[244] None of the regulations governing these privileges provides for any type of hearing. ***See*** AR 28-1, chapt. 3 (arts and crafts); *id.*, chapt. 4 (dependent youth activities); *id.*, chapt. 5 (library); *id.*, chapt. 6 (music and theatre program); *id.*, chapt. 7 (outdoor recreation); AR 28-56 (8 Jan. 1975) (bowling); AR 28-62 (28 Aug. 1972) (motion pictures); AR 28-63 (20 Nov. 1972) (theaters).

of service personnel, their families and other members of the military community through promoting organized and diversified activities.[245] Among these benefits are such activities as the Arts and Crafts Program, Dependent Youth Program, Army Library Program, Music and Theatre Program, Army Recreation Center Program, Sports and Athletic Training Program, the Outdoor Recreation Program, the Army Bowling Program, the Army and Air Force Motion Picture Service and others. The golf course, go-cart tracks, riding stables, ski slopes, roller skating rinks and ice skating rinks are a few of the services that fall into this category.

1. Individual's Interest

The individual's interest in retaining the use of these free or inexpensive outlets for physical or mental recreation is obvious. The programs present opportunities for broadening one's experience while maintaining the fitness required for military preparedness. In some areas, equivalent facilities are not available and a loss of the on-post privilege would effectively terminate participation in such activities. Aside from the availability of these facilities at no or only nominal cost, some facilities provide special shopping opportunities which could arguably create an interest in protecting the monetary savings potential from use of these outlets. Summing up the individual's interest in this group of privileges, it would be fair to say that these privileges are helpful, nonnecessities that do not rise to the same level as the other benefits discussed.

2. *The Government's Interest*

The government's interest is in maintaining the programs in such a posture that the military community will participate in them to attain their stated goals. In maintaining that interest, the command would be concerned with removing those persons who cause disturbances, interfere with other persons' enjoyment, and damage or destroy recreational property.

3. *Balancing for Hearing Requirements*

Balancing the individual's interest in the continued use of these recreational or entertainment facilities against the government's interest in maximizing participation in the programs by members of the military community reveals that due process requirements are nominal. Basically, there should be a reliable basis on which to act. After that requirement has been met, a written notice of termination of the privilege stating the factual basis for the termination should be sent to the party for his acknowledgement. Although

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[245] **AR** 28-1, **para.** 23.

probably not required by due process, the notice letter could give the addressee the opportunity to submit a written reply within a reasonable time from the date of receipt. Because the individual's interest in maintaining the use of these facilities is not as substantial as the government's interest in keeping the system working, the revocation procedures are not demanding.

4. Testing the Army Regulations

Looking at the regulatory provisions for suspension and termination of eligibility for participation in the programs, one finds only a brief statement:

> The rights of eligible individuals or groups to participate in the programs, use the facilities, or have access to the areas may be suspended, terminated or denied when such action is determined by the appropriate commander to be in the best interest of the activity or the installation.[246]

No mention is made in many of the particular regulations of how one loses his privileges. General references to the basic recreation services regulation are the only link to revocation requirements. It is therefore reasonable to assume that the basic regulation controls revocation requirements.

The requirements deduced as necessary in this area of benefits are probably those which are being utilized at the current time. There has to be a notification of the suspension or termination. It is likely that the letters being sent out contain at least a brief statement of the reasons for the termination of privileges. The only possible additional requirement is that of permitting written responses from the respondent.

Here, as in all such actions, the command should be concerned with both the legal requirements and the cosmetic effect of its actions. Going beyond the bare minimal requirements to extend an opportunity for response from a soldier or his dependents will generally exhibit the type of fair treatment which produces respect for the command.

IV. CONCLUSIONS AND RECOMMENDATIONS

There are many benefits or privileges which accrue to the serviceman and his family when he joins the military community. Some of those benefits granted through regulations become important assets to the soldier and his family. He obtains a vested in-

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[246] *Id.* at para. 1-6*c*.

terest in the continuation of those privileges. The Supreme Court some time ago delivered the *coup de grâce* to the old "right-privilege" distinction and that distinction no longer has vitality in the determination of the application of due process protections to administrative actions. The federal case law supports the proposition that to suspend or terminate interests, governmental authorities must adopt procedures which comply with due process standards. The needs of the military are weighed against the individual's interest in determining exactly what procedures are required in a given situation.

Because the balancing of the countervailing interests is affected by the particular circumstances of both the Government and the individual, the concept of due process must be one of great flexibility. The standards for some administrative proceedings may differ in a combat area because of heightened governmental interests. The interests of the individual also vary in light of the individual's circumstances and the particular issues and circumstances of a given case.

Keeping in mind all the variations possible, it is clear that a single standard procedure is not possible for all cases unless that standard is set at the highest level, providing a complete, quasi-judicial hearing with all the trappings. That is not a practical solution. It is not an economical use of manpower or time. An Army regulation should attempt to set a procedure that will be legally sufficient for the majority of cases. At the same time, it should establish the responsibility at the local installation to upgrade the procedures when the interests of the individual so dictate. It is only in this way that the flexibility of the due process concept can retain its pliancy.

A proposed system should involve the post judge advocate prior to the hearing in order to avoid rehearings. Other decision makers will need to be made aware of this practice in order to provide legal review of the procedures prior to revoking on-post privileges.

Some of the procedures proposed in Section III of this article represent more demanding procedures than are presently in use. They should not be looked upon as the prelude to a flood of administrative hearings. Due process only requires an "opportunity" for a hearing, not an actual hearing unless it is requested. When adequate written notification of the proposed action is accompanied by detailed evidence supporting the revocation, most individuals will probably forego the hearing unless they feel the factual allegations are not true and can be refuted.

Thus, the interests of both the Government and the individual may be served by providing for meaningful hearings. The com-

mander is interested in making his determinations on the basis of the best, reasonably available evidence. It is through due process that this is accomplished. Both the individual and the Army will benefit when fundamental fairness permeates the commander's suspension and revocation of the individual's on-post privileges.

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*Mention of a work in this section does not preclude later review in the *Military Law Review.*

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